



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Parts 122, 123, 124 and 125**

**[EPA-HQ-OW-2016-0145; FRL 9936-62-OW]**

**RIN 2040-AF25**

### **National Pollutant Discharge Elimination System (NPDES): Applications and Program Updates**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

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**SUMMARY:** The Environmental Protection Agency (EPA) proposes revisions to the National Pollutant Discharge Elimination System regulations to eliminate regulatory and application form inconsistencies; improve permit documentation, transparency and oversight; clarify existing regulations; and remove outdated provisions. This proposal would make specific targeted changes to the existing regulations and would not reopen the regulations for other specific or comprehensive revision. These proposed regulatory changes cover 15 topics in the following major categories: permit applications; the water quality-based permitting process; permit objection, documentation and process efficiencies; the vessels exclusion; and the Clean Water Act (CWA) section 401 certification process. These revisions would further align NPDES regulations with statutory requirements from the 1987 CWA Amendments and more recent case law requirements. By modernizing the NPDES regulations, the proposed revisions would provide NPDES permit writers with improved tools to write well-documented permits to protect human health and the environment. The revisions would also provide the public with enhanced opportunities for public participation in permitting actions.

**DATES:** Comments must be received on or before [insert date 60 days after publication in the Federal Register].

**ADDRESSES:** EPA has set up two Dockets for submitting comments. Submit your comments on the NPDES Application and Updates rule to Docket ID No. EPA-HQ-OW-2016-0145 at <http://www.regulations.gov>. Regarding potential future changes to application forms and information collection requirements, submit your comments to Docket ID No. EPA-HQ-OW-2016-0146 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Erin Flannery-Keith, Water Permits Division, Office of Wastewater Management, Mail Code 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; (202) 566-0689; [flannery-keith.erin@epa.gov](mailto:flannery-keith.erin@epa.gov).

**SUPPLEMENTARY INFORMATION:**

EPA is proposing targeted revisions to the NPDES regulations. These revisions would make the regulations consistent with the 1987 CWA Amendments and with applicable judicial decisions. These revisions would delete certain regulatory provisions that are no longer in effect and clarify the level of documentation that permit writers must provide for permitting decisions. EPA is also asking for public comments on potential ways to enhance public notice and participation in the permitting process. CWA section 402 established the NPDES permitting program and gives EPA authority to write regulations to implement the NPDES program. 33 U.S.C. 1342(a)(1), (2).

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## I. General Information

### A. Does this action apply to me?

Entities potentially affected by this action are: EPA; authorized state, territorial, and tribal programs; and the regulated community. This table is not intended to be exhaustive; rather, it provides a guide for readers regarding entities that this action is likely to regulate.

TABLE I-1—ENTITIES POTENTIALLY AFFECTED BY THIS PROPOSED RULE

Category	Examples of potentially affected entities
State, Territorial, and Indian Tribal Governments	States, Territories, and Indian Tribes authorized to administer the NPDES permitting program; States, Territories, and Indian Tribes that provide certification under section 401 of the CWA; States, Territories, and Indian Tribes that own or operate treatment works.
Municipalities	POTWs required to apply for or seek coverage under an NPDES individual or general permit and to perform routine monitoring as a condition of an NPDES permit.
Industry	Facilities required to apply for or seek coverage under an NPDES individual or general permit and to perform routine monitoring as a condition of an NPDES permit.

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

**B. What action is EPA taking?**

EPA is proposing targeted revisions to the NPDES regulations. These revisions would make the regulations consistent with the 1987 CWA Amendments and with requirements established by judicial decisions. These revisions would delete certain regulatory provisions that are no longer in effect, and clarify the level of documentation that permit writers must provide for permitting decisions. These revisions would also allow permit writers to use more consistent data for permitting decisions and would modernize opportunities for public notice and participation in NPDES permitting actions.

C. What is EPA's authority for taking this action?

CWA section 402 established the NPDES permitting program and gives EPA authority to write regulations to implement the NPDES program. 33 U.S.C. 1342(a)(1), (2).

D. What are the incremental costs and benefits of this action?

This proposal involves several revisions to the NPDES regulations. It is EPA's view that these revisions would generally not result in new or increased workload or information collection by authorized states or the regulated community. The proposed fact sheet documentation requirements may impose only a minimal burden for the permit writer to document permit development analyses that he or she has already conducted. The assessment of impacts is provided for each topic in section IV of this proposal.

## **II. Background and Executive Summary**

The Federal Water Pollution Control Act Amendments of 1972, commonly referred to as the Clean Water Act, were enacted to restore and maintain the chemical, physical, and biological integrity of the nation's waters. CWA section 301 prohibits the discharge of any pollutant to waters of the United States except in compliance with certain sections of the Act, including CWA section 402. Section 402 established the NPDES permit program to be administered by EPA or authorized states, territories or eligible tribes.<sup>1</sup> The NPDES permit program provides two types of permits, individual and general, that may be used to authorize point source discharges of pollutants to waters of the United States. Individual permits are issued by the state or EPA to a

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<sup>1</sup> Hereafter, the use of "state" includes states and territories unless otherwise noted. Tribes can apply to administer NPDES programs pursuant to 40 CFR 123.32 and 123.33. Because no tribe has yet applied under these sections, this preamble does not specifically discuss tribes. The proposed rule would apply, however, to any tribal NPDES program authorized by EPA in the future.

single facility and require submission of a permit application. General permits are developed by the state or EPA to cover classes or categories of dischargers under a single permit. General permits typically require facilities seeking permit coverage to submit a notice of intent (NOI) to be covered, the contents of which are described in the general permit. Both types of permits are issued for a fixed period of time not to exceed five years. CWA section 402(b)(1)(B) and 40 CFR 122.46.

Under the NPDES regulations, EPA has developed eight individual permit application forms for applicants seeking coverage under individual permits. 40 CFR 122.21. Each individual permit application form corresponds to a different category of dischargers subject to permitting.<sup>2</sup> After receiving an application for an individual permit, the permit writer reviews the application for completeness and accuracy. Once the permit writer determines that the application is complete, the permit writer uses the application data to develop the draft permit and either the fact sheet or statement of basis that explains the rationale behind the draft permit provisions. . 40 CFR 122.21.

The first major step in the permit development process is deriving technology-based effluent limits (TBELs). 40 CFR 122.44(a). The permit writer then determines whether, after application of the TBELs, the discharge will cause, have the reasonable potential to cause, or contribute to an excursion above a narrative or numeric criterion within a state water quality standard (WQS). If the permit writer determines that, notwithstanding application of technology-based limits, the discharge “will cause, have the reasonable potential to cause, or contribute to an excursion above any [s]tate water quality standard,” the permit writer derives effluent limitations necessary to meet state WQS (i.e., water quality-based effluent limits (WQBELs)). 40 CFR 122.44(d)(1). The

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<sup>2</sup> The current suite of NPDES application forms can be found at <http://www.epa.gov/npdes/npdes-applications-and-forms>.

permit writer then includes final effluent limitations (TBELs and WQBELs) that implement all applicable technology and water quality standards in the permit. After developing the effluent limits, the permit writer develops and includes appropriate monitoring and reporting conditions and facility-specific special conditions. 40 CFR 122.43, 122.44(i), 122.44(k) and 122.48. The permit writer also includes the standard conditions that are required for all NPDES permits. 40 CFR 122.41 and 122.42. The permit's fact sheet or statement of basis documents the decision-making process for deriving the permit limits and establishing permit conditions. 40 CFR 124.7, 124.8 and 124.56.

After the draft permit is complete, the permitting authority provides an opportunity for public participation in the permitting process. A public notice announces the availability of the draft permit and administrative record and gives interested parties an opportunity to submit comments and request a public hearing. 40 CFR 124.10 and 124.11. After taking into account all significant comments raised during the comment period, the permitting authority develops the final permit with careful attention to documenting the process and decisions for the administrative record. The permitting authority then issues the final permit to the facility. 40 CFR 124.10, 124.15, and CWA section 402(b).

Under CWA section 402(b), a state or eligible tribe<sup>3</sup> may obtain authorization to administer the NPDES permit program. In order to obtain authorization, the state or eligible tribe must demonstrate to EPA that it has the authorities and resources necessary to implement the program as outlined in CWA section 402(b) and as specified in an EPA/state memorandum of agreement (MOA). When EPA revises the NPDES regulations, authorized states may need to amend their own regulations and legal authorities to ensure their programs continue to be as stringent as the

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<sup>3</sup> A tribe found eligible pursuant to § 123.32 to be treated in a manner similar to a state to administer the NPDES program.



federal program. To date, 46 states and the Virgin Islands have obtained authorization to administer the NPDES permit program.<sup>4</sup> In general, once a state is authorized to administer the program, EPA no longer conducts these activities. CWA section 402(c) and 402(n). However, in accordance with CWA section 402(d), its implementing regulations at 40 CFR 123.44, and the EPA/state MOA, the state must provide EPA with an opportunity to review certain permits, and EPA may object based on one or more of the causes identified in these regulations. If the state permitting agency does not satisfactorily address the points of objection within the applicable timeframe, exclusive authority to issue the permit passes to EPA. 40 CFR 123.44(h)(3).

If a state or tribe does not have an approved NPDES program, EPA administers the NPDES program. Under CWA section 401, a federal agency may not issue a permit or license for an activity that may result in a discharge to waters of the United States until the state or tribe<sup>5</sup> where the discharge would originate has granted or waived section 401 certification. The central feature of section 401 is the state or tribe's ability to either grant, grant with conditions, deny, or waive certification.

EPA regulations establish permit application requirements and corresponding forms for use by all applicants for EPA-issued permits. Where a state chooses not to use the EPA forms, the state is responsible for developing and using its own forms; however, the state forms must collect all of the data that the EPA regulations require.

EPA has developed several guidance documents to help permitting authorities manage the quality and consistency of NPDES permits. The NPDES Permit Writers' Manual (NPDES

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<sup>4</sup> Authorized states are listed in <http://www.epa.gov/npdes/npdes-state-program-information>

<sup>5</sup> Some tribes have EPA-approved water quality standards. *See* 40 CFR 131.8.

PWM)<sup>6</sup> provides a comprehensive overview of the framework of the NPDES program and provides basic training on the requirements for the development and issuance of a legally defensible and enforceable NPDES permit. The NPDES PWM is also a resource for other stakeholders interested in the NPDES permitting process.

The revised Technical Support Document for Water Quality-Based Toxics Control (TSD)<sup>7</sup> provides states and EPA Regional offices with guidance on procedures for use in the water quality-based control of toxic pollutants. The document provides guidance for each step in the water quality-based toxics control process, from the technical and regulatory considerations for the application of WQS to NPDES compliance monitoring and enforcement.

This proposed rule addresses application, permitting, monitoring, and reporting requirements that have become obsolete or outdated due to programmatic and technical changes that have occurred over the past 35 years. These topics were selected from previous NPDES regulatory streamlining efforts, recommendations from EPA Headquarters and Regional offices, and recommendations from state NPDES permitting agencies. With these proposed revisions and requests for public comment, EPA aims to allow easier determination of who is regulated, clarify applicable compliance requirements, and improve transparency by providing permitting authorities and the public with timely and quality access to information on regulated entities' activities. These revisions would make specific, targeted changes to several sections of the NPDES regulations, and are not intended to reopen the regulations for other revisions.

EPA identified this proposal in response to Executive Order 13563 Improving Regulation and Regulatory Review in the document Improving Our Regulations: Final Plan for Periodic

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<sup>6</sup> U.S. EPA NPDES Permit Writers' Manual; U.S. EPA, Office of Water, September 2010; EPA-833-K-10-001. (NPDES PWM) [http://www.epa.gov/npdes/pubs/pwm\\_2010.pdf](http://www.epa.gov/npdes/pubs/pwm_2010.pdf)

<sup>7</sup> U.S. EPA Technical Support Document for Water Quality-based Toxics Control, Office of Water, March 1991; EPA-505-2-90-001. <http://www.epa.gov/npdes/pubs/owm0264.pdf>

Retrospective Reviews of Existing Regulations (section 2.1.8). This effort is a “plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”<sup>8</sup> The issues being addressed in this rulemaking directly align with the goals established in Executive Order 13563.

The proposed rule covers 15 topics grouped into major categories of changes: permit application requirements; the water quality-based permitting process; permit objection, documentation, and process efficiencies; vessels exclusion; and the CWA section 401 certification process. This is a table of the proposed or discussed changes in those categories.

TABLE II–1—PROPOSED TOPICS FOR REVISION AND PUBLIC COMMENT

Category	Proposed Topic for Revision
<b>Permit Application Requirements</b>	<ul style="list-style-type: none"> <li>• Purpose and Scope (40 CFR 122.1)</li> <li>• NPDES Program Definition including: Pesticide Applications to Waters of the United States, Proposed Permit, New Discharger and Whole Effluent Toxicity Definition (40 CFR 122.2);</li> <li>• Changes to Existing Application Requirements (40 CFR 122.21).</li> </ul>
<b>Water Quality-Based Permitting Process</b>	<ul style="list-style-type: none"> <li>• Antidegradation Reference (40 CFR 122.44(d));</li> <li>• Dilution Allowances (40 CFR 122.44(d));</li> <li>• Reasonable Potential Determinations for New Discharges (40 CFR 122.44(d));</li> <li>• Best Management Practices (40 CFR 122.44(k))</li> <li>• Anti-backsliding (40 CFR 122.44(l));</li> <li>• Design Flow for Publicly Owned Treatment Works (40 CFR 122.45(b)).</li> </ul>
<b>Permit Objection, Documentation and Process Efficiencies</b>	<ul style="list-style-type: none"> <li>• Objection to Administratively Continued Permits (40 CFR 123.44);</li> <li>• Public Notice Requirements (40 CFR 124.10(c));</li> <li>• Fact Sheet Requirements (40 CFR 124.56); and</li> <li>• Deletion of 40 CFR 125.3(a)(1)(ii).</li> </ul>

<sup>8</sup> Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations, August 2011, available at [http://www2.epa.gov/sites/production/files/2015-09/documents/eparetroreviewplan-aug2011\\_0.pdf](http://www2.epa.gov/sites/production/files/2015-09/documents/eparetroreviewplan-aug2011_0.pdf)

Category	Proposed Topic for Revision
<b>Vessels Exclusion</b>	<ul style="list-style-type: none"> <li>• Vessels Exclusion (40 CFR 122.3(a)).</li> </ul>
<b>CWA section 401 Certification Process</b>	<ul style="list-style-type: none"> <li>• CWA section 401 Certification Process (40 CFR 124.55(b))</li> </ul>

### **III. Proposed Revisions**

#### **A. Proposed Revisions to Part 122**

##### **1. Purpose and Scope (40 CFR 122.1)**

###### **a) NPDES contact information**

EPA is correcting contact information included in the Note to § 122.1 by deleting outdated references to program contact information that is no longer available to “Information concerning the NPDES program and its regulations can be obtained by contacting the Water Permits Division (4203), Office of Wastewater Management, U.S.E.P.A., 1200 Pennsylvania Avenue, NW., Washington, DC 20460 and by visiting the homepage at <http://www.epa.gov/npdes>.”

##### **2. NPDES Program Definitions (40 CFR 122.2)**

###### **a) Pesticide Applications to Waters of the United States**

EPA proposes to add a definition of “pesticide applications to waters of the United States.” In 2009, the decision in *National Cotton Council, et al. v. EPA*, 553 F.3d 927 (6<sup>th</sup> Cir. 2009) found that point source discharges of biological pesticides and chemical pesticides that leave a residue to waters of the United States are pollutants under the CWA and therefore require NPDES

permits. EPA, and subsequently authorized states, developed a Pesticide General Permit (PGP)<sup>9</sup> to permit discharges for certain use patterns. EPA finalized its PGP in October 2011.

This proposal defines the term “pesticide applications to waters of the United States” to mean point source discharges to waters of the United States resulting from the application of biological pesticides or chemical pesticides that leave a residue. This definition would clarify who is already regulated by ensuring that the NPDES regulations are consistent with the 6<sup>th</sup> Circuit decision. By defining “pesticide applications to waters of the United States” in its comprehensive NPDES definitions at 40 CFR 122.2 in the same way as the PGP defines covered activities, EPA would increase clarity and consistency. This definition would not in any way change which pesticide discharges are subject to NPDES permitting.

EPA seeks comments on this proposed definition.

b) Proposed Permit

EPA proposes to revise the existing definition of “proposed permit.” The definition would be expanded to include a state-issued NPDES permit designated as a “proposed permit” under a new section of the regulations, § 123.44(k).

EPA seeks comments on this proposed definition, described below in the discussion of the proposed new § 123.44(k). See preamble section III.B.1, “Objection to Administratively Continued Permits (40 CFR 123.44).”

c) New Discharger

EPA is correcting a typographical error in subsection (d) of this definition by changing “NDPES” to “NPDES.”

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<sup>9</sup> U.S. Environmental Protection Agency National Pollutant Discharge Elimination System Pesticide General Permit (PGP) for Discharges from the Application of Pesticides, October 31, 2011. [http://www3.epa.gov/npdes/pubs/final\\_pgp.pdf](http://www3.epa.gov/npdes/pubs/final_pgp.pdf)

d) Whole Effluent Toxicity (WET)

EPA proposes to revise the existing definition of WET to refer to both acute (lethal) and chronic (lethal and sublethal) WET test endpoints. The current WET definition in § 122.2 states that WET is “the aggregate toxic effect of an effluent measured directly by a toxicity test.” The proposed clarified definition would specify that toxicity can include both acute and chronic effects.

This clarification would be consistent with EPA’s interpretation of its existing WET regulations, as reflected in the preamble to the NPDES regulations establishing the existing WET definition, and in EPA’s WET test methods. In the preamble to the regulations that established this definition, EPA stated, “effluent limitations may be expressed as chronic toxicity or acute toxicity (or both),” recognizing that toxicity can include both endpoints. 54 FR 23871 (June 2, 1989). Similarly, EPA’s 2002 promulgated WET freshwater and saltwater test methods include definitions for both acute and chronic (sublethal) toxicity, and procedures for testing for both acute and chronic (sublethal) toxic effects, also demonstrating that WET encompasses both types of toxicity. 40 CFR 136.3; 67 FR 69952, November 19, 2002.<sup>10</sup> In these test methods, EPA defines “acute toxicity” as a short-term observation (24 to 96 hours) including death (lethality). EPA defines “chronic toxicity” as a longer-term observation (1 hour and up to 9 days) for life-cycle endpoints which includes lethality (death) and other sublethal endpoints such as effects on growth, reproduction, and mobility.<sup>11</sup> EPA’s WET test methods, including the procedures for

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<sup>10</sup> 2002 ratified EPA WET Test Methods (Acute and Chronic freshwater and saltwater WET methods such as “Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms [Third Edition/October 2002]” – see introduction sections 2.1.1 and 2.1.2). See <http://www.epa.gov/cwa-methods/whole-effluent-toxicity-methods>

<sup>11</sup> Id.

both acute and chronic (including sublethal endpoints) toxicity tests, were challenged and subsequently upheld in *Edison Electric Inst. et al. v. EPA*. 391 F.3d 1267 (D.C. Cir. 2004).

This proposed clarification would also be consistent with WET program guidance documents<sup>12</sup> and EPA's Great Lakes Initiative. See 40 CFR 132.2; Appendix F to Part 132, Procedure 6. These documents include references to and discussion of both acute and chronic toxicity (including sublethal effects such as propagation) and acute and chronic WET test endpoints.

Defining toxicity to include sublethal effects is consistent with the CWA, which establishes a national goal of "water quality which provides for the protection and propagation of fish, shellfish and wildlife." CWA section 101(a)(2). CWA sections 301 and 302 contain various other references to the "protection and propagation" of aquatic organisms, evidencing an intent to protect against not only lethality but also sublethal effects on fish and wildlife. CWA sections 301(h)(2), 301(g)(2)(C), 302(a), 304(a)(5)(B).

EPA notes that this proposed clarification would not change any existing regulatory requirements with respect to inclusion of acute or chronic WET limits in permits. Specifically, it would not change the existing requirement that NPDES permits include WET limits where necessary to meet state numeric and narrative water quality criteria for aquatic life protection. 40 CFR 122.44(d)(1)(iv) and (v). Under this regulation, permit limits must be written to meet states' WET WQS. Thus, if a state's WET WQS require controls for both acute and chronic toxic effects, permit limits must be written to meet both WET test endpoints. If a state's WET WQS

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<sup>12</sup> Three examples of longstanding policies include: EPA NPDES guidance documents (including WET documents): 1991 EPA Technical Support Document (TSD) for Water Quality-based Toxics Control (March 1991, EPA/505/2-90-001), EPA's Generalized Methodology for Conducting Industrial Toxicity Reduction Evaluations (TREs) guidance document (April 1989, EPA/600-2-88/070), and EPA's Toxicity Reduction Evaluation Guidance for Municipal Wastewater Treatment Plants (August 1999, EPA/833-B-99-002, revised edition from previous 1989 edition). See additional documents at <http://www.epa.gov/npdes/npdes-wet-programmatic-documents>.

require controls only on either acute or chronic toxicity, then the permit WET limits would be written to meet protection of only the applicable WET endpoints.<sup>13</sup> The proposed clarification of the current definition would not change the current regulatory requirements for whether permits must control for acute or chronic toxicity – which is currently, and will continue to be, based on the level of protection against toxicity that the state’s WQS provide. The proposed clarification would simply reflect what is already clear under EPA’s promulgated WET test methods and other documents referenced above, and in state water quality criteria for WET: that WET can include both acute and chronic (sublethal) effects. Because permit limits would continue to be based on a state’s applicable water quality criteria for toxicity, whether acute and/or chronic, the proposed clarification would not change current longstanding practice of implementing WET or increase any burden on permittees.

EPA seeks comment on this proposed clarification of its current definition of WET.

### 3. Vessels Exclusion (40 CFR 122.3(a))

EPA proposes to revise § 122.3(a) to clarify which vessel discharges are excluded from the requirement to obtain NPDES permits.

The exclusion for discharges incidental to the normal operation of a vessel at 40 CFR 122.3(a), as it currently appears in EPA’s regulations, was challenged in *Northwest Environmental Advocates et al. v. United States EPA*, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005). On March 30, 2005, the court determined that the exclusion exceeded the EPA’s CWA authority. In September 2006, the court issued a final order vacating the exclusion. *Northwest*

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<sup>13</sup> All state water quality standards include criteria for aquatic life protection. In all but one state, the water quality standards contain provisions to protect against both acute and chronic toxicity including sublethal endpoints in their narrative and/or numeric aquatic life protection criteria. One state, Iowa, has been working to revise its standards to include chronic toxicity including chronic sublethal endpoints but to date has acute endpoints (lethality) only.



*Environmental Advocates et al. v. United States EPA*, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006).

EPA appealed the District Court's decision to the U.S. Court of Appeals for the Ninth Circuit, and on July 23, 2008, the Ninth Circuit upheld the decision. *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008). Effective December 19, 2008, except for those vessel discharges exempted from NPDES permitting by Congressional legislation, discharges incidental to the normal operation of vessels which had previously been excluded from NPDES permitting by 40 CFR 122.3(a) were subject to CWA section 301's prohibition against discharging, unless authorized by an NPDES permit. In response to the District and Court of Appeals decisions, EPA issued the Vessel General Permit (VGP) on December 19, 2008, which generally authorizes discharges incidental to the normal operation of commercial vessels that were no longer excluded from NPDES permitting as a result of the vacatur. In February 2013, EPA issued a new VGP, which replaced the 2008 VGP upon its expiration in December 2013. The 2013 VGP is currently in effect to authorize these discharges incidental to the normal operation of commercial vessels.

In late July 2008, Congress enacted two pieces of legislation to exempt discharges incidental to the normal operation of certain types of vessels from the need to obtain an NPDES permit. The Clean Boating Act of 2008 amended the CWA to provide that discharges incidental to the normal operation of recreational vessels are not subject to NPDES permitting, and are instead subject to a new regulatory regime to be implemented by EPA and the U.S. Coast Guard under a new section 312(o) of the CWA. S. 2766, Pub. L. 110-188 (July 29, 2008). As defined in section 3 of that law, which amends CWA section 502, "recreational vessel" means a vessel manufactured or used primarily for pleasure, or leased, rented or chartered to a person for the

pleasure of that person. It does not include a vessel that is subject to Coast Guard inspection and is either engaged in commercial use or carries paying passengers. As a result of this legislation, discharges incidental to the normal operation of recreational vessels are not subject to NPDES permitting. EPA proposes adding a new subsection, 40 CFR 122.3(a)(2), to incorporate this statutory exemption.

The second piece of legislation provides for a temporary moratorium on NPDES permitting for discharges incidental to the normal operation of a vessel from (1) commercial fishing vessels (as defined in 46 U.S.C. 2101 and regardless of size) and (2) those other non-recreational vessels less than 79 feet in length. S. 3298, Pub. L. 110-299 (July 31, 2008). The statute's NPDES permitting moratorium ran for a two-year period beginning on its July 31, 2008 enactment date, during which time EPA studied the relevant discharges and prepared a report which was submitted to Congress in August 2010. Congress subsequently extended this moratorium to December 18, 2013 by Public Law 111-215. On December 18, 2014, President Obama signed into law the Howard Coble Coast Guard and Maritime Transportation Act of 2014, S.2444, which extended the moratorium for an additional three years until December 18, 2017. EPA proposes text in 40 CFR 122.3(a) to reflect this law. The new proposed text also reiterates that the statute's NPDES permitting moratorium does not extend to ballast water discharges, or to other discharges that the permitting authority determines contribute to a water quality standards violation or which pose an unacceptable risk to human health and the environment.

EPA is also proposing an update to the existing exclusion to incorporate language regarding discharges incidental to the normal operation of vessels of the Armed Forces that was added to the CWA definition of "pollutant" after the promulgation of the original § 122.3(a) vessel discharge exclusion. Section 301(a) of the CWA provides that "the discharge of any pollutant by

any person shall be unlawful” unless the discharge is in compliance with certain other sections of the Act, including the section 402 NPDES program. 33 U.S.C. 1311(a), 1342. Under CWA section 402(a), EPA may “issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a)” subject to certain conditions required by the Act. The Act's definition of “pollutant” specifically excludes “sewage from vessels *or a discharge incidental to the normal operation of a vessel of the Armed Forces*” (emphasis added) within the meaning of CWA section 312. 33 U.S.C. 1362(6). The proposed change to § 122.3(a) reflects the statutory exclusion for discharges incidental to the operation of a vessels of the Armed Forces.

These changes would reduce confusion by accurately reflecting the current scope of the exclusion from NPDES permitting for discharges incidental to the normal operation of a vessel operating in a capacity as a means of transportation, which has narrowed since the exclusion was originally promulgated. These clarifications align with the decision in *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), which vacated the § 122.3(a) exclusion from NPDES permitting for discharges incidental to the normal operation of a vessel. In addition, these clarifications incorporate or otherwise address CWA provisions that were enacted by Congress after the current regulations were promulgated.

EPA requests comments on whether the proposed changes to 40 CFR 122.3(a) accurately and clearly reflect the current law regarding which vessel discharges are subject to the NPDES permitting requirements. EPA does not seek and will not consider comments on aspects of 40 CFR 122.3(a) text that EPA does not propose to change, such as the discussion in the regulation of the types of vessel discharges that are not (and never have been) excluded from NPDES permitting under this regulation (e.g., seafood processing vessels).

#### 4. Changes to Existing Application Requirements (40 CFR 122.21)

EPA proposes to update and clarify the permit application requirements in 40 CFR 122.21. As the NPDES program has evolved, many existing application requirements and associated forms have become outdated with respect to current program practices. Therefore, revisions to the application requirements at 40 CFR 122.21 and to the accompanying application forms are needed to update and improve their consistency, accuracy, and usability.

CWA section 304(i)(1) (previously section 304(h)(1)) required EPA to promulgate guidelines for “establishing uniform application forms and other minimum requirements for the acquisition of information” from point sources within 60 days after its enactment. In 1973, EPA promulgated short forms to meet these deadlines and standard forms to gather additional information from certain dischargers.

Amendments to the CWA in 1977 refocused EPA priorities on regulating toxic pollutants. As a result, the NPDES program expanded beyond regulating conventional pollutants to regulating toxic pollutants including certain metals and organic chemicals, and nonconventional pollutants such as ammonia, chlorine, and nitrogen.

To simplify permitting across several environmental programs, EPA published regulations on May 19, 1980 (45 FR 33290) to consolidate the requirements and procedures for five of the permit programs that EPA administers: the NPDES program, the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), state “dredge or fill” programs under section 404 of the CWA, the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA). This effort sought to eliminate gaps and overlaps and ensure consistency among the programs where appropriate.

At the same time, EPA consolidated the requirements and procedures for the five permit programs, it revised the permit application regulations. EPA created three new application forms: Form 1, Form 2B, and Form 2C. Form 1 requires general information about permit applicants and is required to be completed by applicants for each of the five types of permits under the consolidated permit rule. Form 2B is specific to NPDES permit applications for CAFOs and aquatic animal production dischargers. Form 2C applies to NPDES permit applications for manufacturing, commercial, mining, and silvicultural operations. All three forms reflected EPA's emphasis on toxic pollutants and other modifications to the CWA and NPDES program regulations.

Following promulgation of the consolidated permit regulations, interested parties commented that the consolidated format made the regulations unnecessarily difficult to use. They commented that dividing responsibilities among various entities at the state and federal levels caused additional problems. In practice, consolidated processing of multiple permits was rare because the various permit programs regulated different activities with different standards and thus imposed different types of requirements on permittees.

In response to problems permit writers encountered, EPA deconsolidated the five permitting programs on April 1, 1983 (48 FR 14146). The NPDES regulations remain in part 122 (substantive permit requirements) and part 123 (state program requirements). Part 124 (common permitting procedures) remains applicable to all of the programs. On September 1, 1983, EPA promulgated additional revisions covering a number of issues affecting the consolidated permit program. 48 FR 39611.

The NPDES program continued to use these application forms<sup>14</sup> (Form 1, Form 2B and Form 2C) after deconsolidation. In 1984, EPA amended Form 2C to include toxic pollutant sampling. In 1986, EPA promulgated two new NPDES forms: Form 2D for use by new manufacturing, commercial, mining, and silvicultural operations; and Form 2E for use by facilities that do not discharge process wastewater. 51 FR 26982.

In 1987, Congress made extensive revisions to the CWA. Water Quality Act (WQA), Public Law 100-4. A new provision, CWA section 402(p), required EPA to establish NPDES requirements for stormwater discharges in two phases. To implement these requirements, EPA published the Stormwater Phase I Rule which established permit application requirements for certain categories of stormwater discharges associated with industrial activity (creating Form 2F) and discharges from large and medium municipal separate storm sewer systems (MS4s). 55 FR 47990. On December 8, 1999, EPA published the Stormwater Phase II Rule regulating stormwater discharges from small construction sites and from certain small MS4s. 64 FR 68722.

In 1999, EPA also amended the permit application requirements and application forms for POTWs and treatment works treating domestic sewage (TWTDSs). 64 FR 42434. The new Form 2A for POTWs addressed a number of changes to the NPDES program that had occurred since 1973 (e.g., toxics control, pretreatment programs, water quality-based permitting), and it streamlined the existing application requirements. The new Form 2S for TWTDSs addressed application requirements associated with new regulatory requirements for the generation, treatment, use and disposal of sewage sludge (biosolids). 58 FR 9248.

In 2000, EPA issued amendments to streamline the NPDES program in response to a Presidential Directive to review regulatory programs to eliminate any obsolete, ineffective, or

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<sup>14</sup> Forms 1, 2A, 2C, 2D, 2E, 2F, 2S (OMB Control No. 2040-0086); Form 2B (OMB Control No. 2040-0250).

unduly burdensome regulations. 65 FR 30886. As part of this streamlining effort, EPA revised several permit application provisions to reduce duplicative requirements and clarify certain application requirements.

On February 12, 2003, EPA issued a final rule revising NPDES requirements for CAFOs. 68 FR 7176. This rule revised the information requirements for entities seeking coverage under an NPDES permit for CAFOs, and revised the NPDES individual permit application for CAFOs (Form 2B for CAFOs and aquatic animal production facilities). Further, in response to an order issued in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005), EPA made several revisions to the CAFO regulations, including changes to the application requirements and Form 2B. 73 FR 70418.

On October 22, 2015, EPA's NPDES Electronic Reporting Rule went into effect, amending 40 CFR Part 127. 80 FR 64063. This rule requires electronic submittal of NPDES permitting and compliance monitoring reporting information. This rulemaking changed the method by which information is provided by permittees to permitting authorities, expediting the collection and processing of data to create a consistent and transparent NPDES data set.

EPA is proposing specific, targeted changes to the current application requirements and is not proposing, or seeking comment on, other changes to the information or pollutant screening data required by the existing regulations and forms. Several revisions included in this proposal are necessary in order to ensure the information required by the application forms across the different categories of facilities submitting applications is consistent with EPA's current data standards<sup>15</sup> and the NPDES Electronic Reporting Rule. EPA data standards promote efficient environmental information sharing among EPA, states, tribes, local governments, the private

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<sup>15</sup> For more information about EPA's Data Standards Program see <http://www.epa.gov/datastandards>

sector, and other information trading partners. These data standards are developed in collaboration with the Environmental Information Exchange Network (EIEN) and other federal agencies. Many of the application forms have not been updated in recent history to incorporate the data standards developed by this group.

EPA proposes updating the industrial code classification requirement to include the facility's North American Industry Classification System (NAICS) code, which is part of the established data standard<sup>16</sup>. Also, EPA proposes updating the latitude and longitude requirement to include the method of data collection, which is a required element in the current standard<sup>17</sup> and can be used to determine the reference datum that is in turn used in determining the latitude and longitude coordinates. In addition, EPA proposes revising the specificity of the latitude and longitude coordinates to provide consistency among forms in the level of information collected. Currently, some forms ask for latitude and longitude to the nearest second, and other forms ask more generally for just latitude and longitude. To ensure precision and improve consistency, EPA proposes revising the application forms and corresponding regulations in 40 CFR 122.21 to ask for latitude and longitude to the nearest second for every facility and permitted feature, as well as the method of collection for this information.

EPA proposes the following revisions to 40 CFR 122.21:

- a. NPDES Contact Information—EPA proposes to update contact information for those interested in obtaining application forms. 40 CFR 122.21(a)(2) will be updated to: U.S. EPA, Mail Code 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by visiting <http://www.epa.gov/npdes>.

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<sup>16</sup> [http://www.exchangenetwork.net/standards/Facility\\_Site\\_01\\_06\\_2006\\_Final.pdf](http://www.exchangenetwork.net/standards/Facility_Site_01_06_2006_Final.pdf)

<sup>17</sup> [http://www.exchangenetwork.net/standards/Lat\\_Long\\_Standard\\_08\\_11\\_2006\\_Final.pdf](http://www.exchangenetwork.net/standards/Lat_Long_Standard_08_11_2006_Final.pdf)



b. North American Industry Classification System (NAICS) Codes – For all applicants except publicly owned treatment works (POTWs) and treatment works treating domestic sewage (TWTDSs), EPA proposes to revise the requirements at 40 CFR 122.21(f)(3) to include NAICS codes, in addition to Standard Industrial Classification (SIC) codes, that reflect the products or services provided by the facility. This proposed revision would update the classification code requirement to be consistent with EPA’s current data standard (NAICS) until EPA completely phases out the use of SIC codes in other program areas, such as the effluent guidelines program.

c. Latitude and Longitude – To improve the consistency and precision of locational information required in permit applications, and to be consistent with EPA data standards, EPA proposes several revisions:

i. For existing manufacturing, commercial, mining, and silvicultural dischargers, EPA proposes revising 40 CFR 122.21(g)(1) and 122.21(h)(1) to require outfall latitude and longitude to the nearest second, including the method of data collection (e.g., global positioning system (GPS) device, topographical map and scale) in accordance with EPA data standards.

ii. EPA proposes revising 40 CFR 122.21(j)(1)(i) and 122.21(j)(3)(i) for new and existing POTWs, and 40 CFR 122.21(k)(1) for new sources and new discharges, to require the latitude and longitude of the discharging facility to the nearest second, including the method of data collection.

iii. For all applicants except POTWs and TWTDSs, EPA proposes to revise 40 CFR 122.21(f)(2) to require the latitude and longitude of the discharging facility to the nearest second, including the method of data collection. In addition, EPA is

proposing to update the corresponding form (Form 1) to include a check box to indicate whether the location represents the primary entry point to the facility or the centroid of the facility site location.

iv. For new and existing concentrated animal feeding operations (CAFOs) and concentrated aquatic animal production (CAAP) facilities, EPA proposes revising 40 CFR 122.21(i)(1)(iii) to require latitude and longitude to the nearest second and the method of data collection.

v. For certain TWTDSs, EPA proposes revising the following paragraphs to require the site latitude and longitude to the nearest second including the method of data collection: 40 CFR 122.21(q)(1)(i), 122.21(q)(8)(ii)(A), 122.21(q)(9)(iii)(B), 122.21(q)(10)(iii)(B), 122.21(q)(11)(iii)(B) and 122.21(q)(12)(i).

vi. For combined sewer systems, EPA proposes revising 40 CFR 122.21(j)(8)(ii)(A)(3) to require the method of collection for the latitude and longitude of the combined sewer overflow (CSO) outfall.

vii. For cooling water intake structures, EPA proposes revising 40 CFR 122.21(r)(3)(ii) to require the intake structure latitude and longitude to the nearest second including the method of data collection.

EPA seeks comments on the availability of longitude and latitude coordinates for the specific locations identified above as well as whether there are any other considerations it should consider relating to submitting these coordinates as part of the application requirements.

EPA proposes revisions to the length of time given to new dischargers to submit effluent information. This revision would ensure that new dischargers submit effluent characterization

data in a manner that is timely and consistent for both POTW and non-POTW dischargers. 40 CFR 122.21(k) currently requires new non-POTW sources to submit data within two years of the commencement of discharge, while 40 CFR 122.21(j) does not establish a timeframe for new POTWs to submit information. EPA's proposed revision would establish a new timeframe of 18 months for both POTW and non-POTW dischargers to submit effluent information to the permitting authority. Specifying a time frame for a POTW to submit actual monitoring results and reducing the time frame (from two years to 18 months) required for a new industrial discharger to submit actual monitoring results would ensure that permitting authorities have more timely access to actual effluent data upon which to confirm or rebut the estimates provided by new dischargers on their initial permit applications. While the estimates provided in the initial applications are useful and appropriate for determining the need for effluent limits, the actual effluent data are vital to confirm that permit conditions developed based on the estimated pollutant concentrations in fact protective of water quality. It is EPA's view that 18 months would provide a reasonable time period for a new discharge to collect representative effluent data and submit the data to the permitting authority. This 18 month timeframe would provide a new discharger with up to a three month time period to ensure that the treatment system is operating efficiently, collect data over a full calendar year, and have three months remaining to submit the data to the permitting authority. These revisions would not alter the type or quantity of information required from a new discharger, and impose no new burden.

EPA proposes the following revisions to 40 CFR 122.21:

- d. New Discharger Data Submission – EPA proposes making the time provided for effluent data submission for new POTWs consistent with the requirement for new industrial dischargers. EPA also proposes to reduce the time period that is provided for

new non-POTW dischargers to submit effluent data. Specifically, the proposed revisions to application requirements for new sources and new discharges at 40 CFR

122.21(k)(5)(vi) would require applicants to submit items V and VI of Form 2C no later than 18 months after the commencement of discharge. The current requirement for submission is two years. The proposed revisions to application requirements for new POTWs at 40 CFR 122.21(j)(4)(i) and 122.21(j)(5)(i) would require submission of data no later than 18 months after the commencement of discharge.

EPA specifically seeks comments on whether 18 months is an adequate period of time for new dischargers to submit effluent data.

EPA proposes revisions to the effluent data submission requirements for non-POTWs to be consistent with those for POTWs. The instructions for Form 2C currently direct applicants to provide all representative data where the applicant has multiple results for a particular parameter. The Form 2C instructions also indicate that data from the past three years should be included. These requirements are not specifically identified in the current regulations and the instructions are not consistent with the requirements for POTWs. When applying for an NPDES permit, an existing POTW must provide effluent data from the previous 4.5 years. The 4.5-year requirement for Form 2A was established to ensure the permittee summarizes all the data collected during its existing five-year permit term with consideration that the application would be submitted six months prior to the end of the permit term (i.e., 4.5 years). It is EPA's view that summarizing the data from the previous permit term is equally as important for non-POTW dischargers.

Accordingly, EPA proposes to revise the application Form 2C instructions as well as to include a new paragraph 40 CFR 122.21(g)(7)(ix) in the regulations to require the submission of effluent

data representing the previous 4.5 years. These revisions would not alter the type or quantity of information required from a discharger, and impose no new burden.

EPA proposes the following revisions to 40 CFR 122.21:

e. Data Age for Permit Renewal – EPA proposes adding 40 CFR 122.21(g)(7)(ix) to ensure that the effluent data submission requirements for non-POTWs are consistent with those for POTWs. EPA proposes to revise the application Form 2C instructions and include a new paragraph in the regulations at § 122.21(g)(7)(ix) to require the submission of effluent data representing the previous 4.5 years for non-POTW facilities.

f. Reporting Electronic Mail Address – EPA proposes revising the following paragraphs in 40 CFR 122.21 to request the applicant’s electronic mailing address (e-mail): § 122.21(c)(2)(ii)(B), § 122.21(f)(4), § 122.21(j)(1)(ii), § 122.21(j)(1)(viii)(2) and (3), § 122.21(j)(9), § 122.21(q)(1)(i), § 122.21(q)(2)(i), § 122.21(q)(8)(vi)(A), § 122.21(q)(9)(iii)(D) and (E), § 122.21(q)(9)(iv)(A), § 122.21(q)(10)(ii)(A), § 122.21(q)(10)(iii)(K)(1), § 122.21(q)(11)(ii)(A), § 122.21(q)(12)(i), and § 122.21(q)(13).

EPA proposes specific targeted changes to the NPDES application requirements for POTWs that would bring the NPDES regulations in concert with changes to the general pretreatment regulations at 40 CFR 403.3(v). Application requirements at 40 CFR 122.21(j) ensure that POTWs submit information for both significant industrial users (SIUs) and categorical industrial users (CIUs), including industrial waste trucked or hauled to the POTW, in order to properly identify types of industries and characterize the wastewater discharged to the POTW. This application information is used by the pretreatment control authority to determine whether a pretreatment program must be developed. Control authorities are POTWs with an approved

POTW pretreatment program, an authorized state pretreatment program, or EPA where there is no authorized state pretreatment program.

Prior to the 2005 national pretreatment program regulations revisions, all CIUs were considered a subset of the broader term “significant industrial users.” In 2005, the general pretreatment regulation at 40 CFR 403.3(v) was revised to allow a control authority to designate certain CIUs, after qualifying and demonstrating continued compliance with categorical standards, as a non-significant CIU (NSCIU). 40 CFR 403.3(v)(ii). Users categorized as NSCIUs must submit an annual certification to maintain their “non-significant” status, but are no longer subject to annual sampling, inspections or permitting requirements such as local limits, which are required for significant users. This resulted in a reporting and permitting burden reduction on these CIUs and the control authorities. However, all CIUs (both those classified as SIUs and NSCIUs) are still subject to industrial sector-specific national categorical standards established in 40 CFR chapter I, subchapter N.

The proposed language at 40 CFR 122.21(j)(6) will clarify that POTWs are required to submit, as part of their application, relevant information from all industrial users (SIUs and NSCIUs). The proposed revision would align the NPDES application requirements with the existing pretreatment regulations at 40 CFR 403.3(v), and would impose no new burden.

EPA proposes the following revisions to 40 CFR 122.21:

g. Reporting Numbers of Significant Industrial Users (SIUs) and Non-Significant Categorical Industrial Users (NSCIUs) – EPA proposes revising 40 CFR 122.21(j)(6)(i) and (ii) to clarify that the reporting requirements under these sections apply to both SIUs and NSCIUs, including trucked or hauled waste, that discharge to a POTW.

EPA is also proposing to revise 40 CFR 122.21(f) to require applicants to indicate whether their facility uses cooling water and to identify the source of that cooling water. This would clarify the need for and ensure the permitting authority receives all of the necessary information required under existing 40 CFR 122.21(r) for the facility. This proposal will not alter any of the existing requirements under 40 CFR 122.21(r), and imposes no new burden.

EPA proposes the following revisions to 40 CFR 122.21:

- h. Cooling Water Intake Structure Indication – EPA proposes adding a new paragraph 40 CFR 122.21(f)(9) to require the applicant to indicate whether the facility uses cooling water and to specify the source of the cooling water and to remind applicants they must comply with any applicable requirements at 40 CFR 122.21(r).

Finally, EPA proposes to revise §§ 122.21(f) and 122.21(j) to require applicants to indicate whether they are requesting any of the variances permitted under 40 CFR 122.21(m) (for non-POTWs) and (n) (for POTWs). This would ensure the permitting authority is aware of the request at the time of permit application and could better determine whether the facility has submitted all of the required information. This proposal would not alter any of the existing requirements of 40 CFR 122.21(m) and (n), and imposes no new burden.

EPA proposes the following revisions to 40 CFR 122.21:

- i. Request for Variance Indication – EPA proposes adding a new paragraph 40 CFR 122.21(f)(10) to require the applicant to indicate whether he or she is requesting any of the variances under § 122.21(m). EPA also proposes adding 40 CFR 122.21(j)(1)(ix) to require the applicant to indicate whether he or she is operating under the variance for POTWs provided in § 122.21(n).

In this rulemaking, EPA is seeking comment only on these specific proposed targeted changes to the current application requirements. EPA is not proposing or seeking comment on other changes to the information or pollutant screening data that the existing regulations and forms require and will not respond to any such comments as part of this rulemaking. However, in the future, EPA may examine all the application forms to determine whether they should be revised further, for example, to address any potentially obsolete elements or information requests inconsistent with regulatory requirements at 40 CFR 122.21. If you would like to address changes to current application requirements other than those raised by this rulemaking, please submit those comments to Docket ID No. EPA-HQ-OW-2016-0146 at <http://www.regulations.gov>.

#### 5. Antidegradation Reference (40 CFR 122.44(d))

EPA proposes to revise 40 CFR 122.44(d) to include a reference to 40 CFR 131.12 in order to ensure consistency with the state antidegradation requirements established under that section. CWA section 301(b)(1)(C) requires that NPDES permit limits be as stringent as necessary to meet water quality standards. Consistent with this requirement, the NPDES regulations at 40 CFR 122.44(d)(1) provide that NPDES permits shall include “any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards... necessary to: (1) achieve water quality standards established under CWA section 303, including state narrative criteria for water quality.” Water quality standards consist principally of three elements: designated uses, water quality criteria and antidegradation policies. 40 CFR 131.6, 131.10-12. Pursuant to EPA’s regulations at 40 CFR 131.12, states must adopt antidegradation policies. An antidegradation policy “specifies the framework to be used in making decisions about proposed activities that will result in changes in water quality” and “can play a critical role in helping



states protect the public resource of water whose quality is better than established criteria levels and ensure that decisions to allow reductions in water quality are made in a public manner and serve the public good.” NPDES PWM, 6.1.1.3. EPA expects permitting authorities to develop NPDES permit terms and conditions consistent with and in consideration of applicable state antidegradation policies and/or requirements. However, this interpretation has not explicitly been included in the NPDES regulations. The federal antidegradation policy has a long legislative history. The Secretary of the Interior established the basic federal antidegradation policy on February 8, 1968. When the CWA was enacted in 1972, the WQS of all 50 states included antidegradation provisions. By providing in 1972 that existing state WQS would remain in force until revised, the CWA ensured that states would continue their antidegradation programs. EPA’s first WQS regulation, promulgated on November 28, 1975, included a similar antidegradation policy at 40 CFR 130.17. 40 FR 55,340-41.

Section 101(a) of the CWA emphasizes the prevention of water pollution and expressly includes the objective “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters” (33 U.S.C. 1251(a)) (emphasis added). The antidegradation requirements that EPA incorporated by regulation in 1983 into 40 CFR 131.12 implement the maintenance aspect of this CWA section 101(a) goal and are an essential component of the overall WQS program.

The CWA section 101(a)(2) goals call for the protection and propagation of fish, shellfish and wildlife, and recreation in and on waters. Although designated uses and criteria are the primary tools states use to achieve this goal, antidegradation complements these by, in part, providing a framework for maintaining and protecting waters that are of higher quality than necessary to support the CWA section 101(a)(2) goals, or are Outstanding National Resource

Waters (ONRWs). Antidegradation plays a critical role in allowing states and tribes to maintain and protect the valuable resource of high quality water by ensuring that decisions to allow a lowering of high quality water are made in a transparent and public manner and are based on a sound technical record.

In the 1987 WQA, Congress expressly affirmed CWA section 101's antidegradation principle and referenced antidegradation policies in section 303(d)(4)(B) of the Act (33 U.S.C. 1313(d)(4)(B)), simultaneously confirming that antidegradation policies are an integral part of the CWA and explaining the relationship of antidegradation policies to other CWA regulatory programs:

Standard Attained – For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable WQS, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any WQS established under this section, or any permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

As the Supreme Court stated in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 705 (1994):

A 1987 amendment to the Clean Water Act makes clear that section 303 also contains an 'antidegradation policy'...Specifically, the Act permits the revision of certain effluent limitations...only if such revision is subject to and consistent with the antidegradation policy established under CWA section 303, 33 U.S.C.1313(d)(4)(B)).

The court also acknowledged the long-standing federal antidegradation policy and EPA's authority to promulgate antidegradation requirements. *Id.* 704-05, 718.

Based on this authority, EPA promulgated its current antidegradation regulation at 40 CFR 131.12 on August 21, 2015. 80 FR 51020. Section 131.12 requires states to develop and adopt a statewide antidegradation policy and develop methods for implementing that policy. It built upon

and refined the pre-existing 1983 regulation which EPA had promulgated at 40 CFR 131.12 on November 8, 1983. 48 FR 51400. Consistent with the Supreme Court decision, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, and the requirements of 40 CFR 131.12, WQBELs must be derived consistent with applicable state antidegradation policies. This is EPA's longstanding interpretation of the CWA. NPDES PWM, 6.1.1.3 and 7.2.1.4.

This interpretation is not expressly included in the existing regulations at 40 CFR 122.44(d)(1); thus, EPA now proposes to revise 40 CFR 122.44(d)(1) to expressly include a reference to 40 CFR 131.12, in order to ensure consistency with the antidegradation provisions in that section. Similar to the existing provision at 40 CFR 122.44(d)(1) noting that "narrative criteria for water quality" are components of water quality standards, including the reference to 40 CFR 131.12 serves notice that antidegradation policies are also components of state water quality standards and must be considered in in permitting decisions where applicable. EPA proposes revising 40 CFR 122.44(d)(1) to include, explicitly, "the state antidegradation requirement" as one of the elements of state WQS that must be applied when deriving WQBELs.

As noted above, because antidegradation is an existing component of all state WQS, the existing regulations at 40 CFR 122.44(d) require state and EPA permitting authorities to ensure that effluent limits derive from and comply with antidegradation requirements. EPA does not propose to change any of its existing interpretations of WQS, antidegradation or any related existing EPA interpretations of state implementation responsibilities. This proposed revision is intended solely as a clarification, and imposes no new burden. The only burden related to this new reference would be where state permitting authorities are not currently implementing elements of their EPA-approved WQS. It is EPA's view that currently, permit writers consider

antidegradation, although NPDES permit records might not necessarily currently reflect this analysis.

EPA seeks comments on this proposed revision to 40 CFR 122.44(d)(1).

#### 6. Dilution Allowances (40 CFR 122.44(d))

EPA proposes to revise 40 CFR 122.44(d) to specify that any allowance for dilution provided under this paragraph must comply with applicable dilution and mixing zone requirements and low flows established in state WQS<sup>18</sup> and be supported by data or analyses quantifying or accounting for the presence of each assessed pollutant or pollutant parameter in the receiving water.

The CWA and its implementing regulations require that NPDES permits include limitations as stringent as necessary to meet applicable WQS. CWA 301(b)(1)(C); 40 CFR 122.44(d)(1). When determining the need for conditions necessary to meet WQS, 40 CFR 122.44(d)(1)(ii) indicates that the permitting authority shall consider, “where appropriate, the dilution of the effluent in the receiving water.” When developing WQS pursuant to CWA section 303(c), EPA regulations at 40 CFR 131.13 provide that states may include in the state standards “general policies” affecting the application of WQS such as mixing zones, low flows and variances. Alternatively, states may address dilution and mixing considerations through implementation policies and guidance. Consistent with these provisions, many state WQS and implementation procedures allow some consideration of dilution and mixing when determining the need for and calculating WQBELs.

The ambient environment mitigates the impact of an effluent discharge on a receiving water in a number of ways, generally related to the nature of the discharged pollutant and the physical,

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<sup>18</sup> See 40 CFR 131.13 (“States may, at their discretion, include in their State Standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances.”)

chemical and biological characteristics of the effluent and receiving water. For many toxic pollutants, dilution is the primary mitigation mechanism. For oxygen-demanding pollutants, such as biochemical oxygen demand (BOD), mitigation may be achieved through both dilution and biodegradation. For other pollutants, mitigation may be achieved through multiple processes, including dilution, biodegradation, chemical reactivity and volatilization. The concentration or mass of a pollutant or pollutant parameter that can be safely mitigated by these various processes in the receiving water without exceeding any applicable WQS and without causing adverse effects is commonly referred to as the “assimilative capacity” of the receiving water.

For any consideration of the dilution of an effluent in a receiving water, modelers must account for the level of the pollutant already present in the receiving water prior to the introduction of the effluent. This is often referred to as the “background” pollutant concentration. The background pollutant concentration can be based on measurements from the receiving water, or where data are unavailable, can be assumed. Where data are available, modelers assess the data and select a value that is considered representative of the site. The selection of the background value might be based on an average of the data, or on an upper or lower statistical boundary, and is generally a matter of state policy or procedure. In any case, modeling requires that the modeler select some background pollutant value.

Where no measured data are available, the modeler could either postpone the analysis to obtain data, or could instead assume a background concentration. For NPDES permitting purposes, the assumed background value could range from zero to a value at or above the applicable water quality criteria. An assumption of zero indicates that the full assimilative capacity of the water is available, while an assumption that the background concentration is at or above the applicable water quality criteria indicates that there is no remaining assimilative

capacity. As noted above, the selection of one of the end point values, or some value between these two extremes, is typically a matter of state policy.

As discussed above, granting any dilution allowance requires the consideration of the background pollutant concentration. NPDES permit reviews have shown that in many instances permitting authorities grant dilution allowances for pollutants assuming the complete absence of the pollutant in the upstream receiving waters. An assumption of “zero background” levels of a pollutant in an upstream water, in the absence of data or analyses to validate such an assumption, results in permit conditions that use as much as 100 percent of the receiving water’s dilution capacity to the discharging facility. Thus, in situations where some of the pollutant is actually present in the upstream waters, an assumption of “zero background” concentration overestimates the available assimilative capacity of the receiving water and could result in limits that are not protective of applicable WQS. EPA has long intended that permit writers should consider information regarding the actual assimilative capacity of the receiving waters and the amount of the pollutant already present in the receiving water when determining dilution allowances and mixing zones.

The current regulations allow consideration of dilution “...where appropriate.” However, the current provision does not indicate what is meant by “appropriate.” EPA proposes to update its NPDES regulations concerning dilution allowances to clarify that while existing regulations allow consideration of dilution “where appropriate,” any allowance for dilution and mixing must be applied in a manner that will ensure that NPDES permits contain limits necessary to achieve WQS, as required by CWA 301(b)(1)(C) and 40 CFR 122.44(d)(1). This proposal is consistent

with EPA’s longstanding guidance<sup>19</sup> that assumptions regarding dilution and mixing are appropriate only where relevant data or information are available to substantiate the assumption.

EPA proposes clarifying 40 CFR 122.44(d)(1) to specify that the appropriateness of any consideration of dilution or mixing must derive from the applicable state WQS, including any general policies related to dilution and mixing. Further, the proposed revision to 40 CFR 122.44(d)(1) would require that decisions regarding the assimilative capacity of the receiving water, for the purpose of determining a dilution allowance, must be supported by data or analyses quantifying or accounting for the presence or absence of each assessed pollutant or pollutant parameter in the receiving water. Conducting a basic background inquiry into a receiving water’s assimilative capacity would be necessary to grant the dilution allowance. Where the actual assimilative capacity of the receiving water cannot be accurately determined or predicted (e.g., by using data, models, or analyses), the permitting authority would be expected to establish effluent limits based on the application of applicable water quality criteria at the point of discharge (often referred to as “criteria end-of-pipe”) in order to ensure that the limits comply with CWA section 301(b)(1)(C).

This revision would ensure that the permitting authority considers data or other available and applicable information before granting a dilution allowance for either rapid and complete or incomplete mixing. Under the proposed revisions, every time a dilution allowance is granted, assuming either rapid and complete or incomplete mixing, the permitting authority would be required to include a basis grounded in analyses of available information. This revision would not require the collection of new data and will not impose a new burden; it is intended to ensure that the permitting authority considers existing valid and representative ambient water quality

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<sup>19</sup> TSD Section 4 and Responsiveness Summary. See also EPA NPDES Permit Writers Manual (2010) Section 6.2 and EPA Water Quality Standards Handbook, Chapter 5 (General Policies)

data and to enhance decision-making transparency when permitting authorities consider a dilution allowance. States also may choose to collect data and information on the receiving water from the applicants, either prior to issuance of the permit or as a condition of the permit. Potential sources of data and information on ambient water quality and flow are maintained by regulatory agencies such as EPA, the United States Geological Survey (USGS) and state-level authorities. Dischargers, monitoring consortia, or non-governmental organizations may also provide ambient monitoring data for these analyses, although permitting authorities should ensure that all data used in any dilution analysis are subject to quality assurance and quality control. In limited circumstances (e.g., where ambient data are unavailable), permitting authorities may satisfy this requirement by conducting a qualitative analysis of the ambient level of a pollutant of concern; however, the analysis must be pollutant- and site-specific, supported by the available information and documented in the record consistent with the revised provisions at 40 CFR 124.56(a)(1)(iv).

EPA seeks comments on this proposed revision to 40 CFR 122.44(d).

#### 7. Reasonable Potential Determinations for New Discharges (40 CFR 122.44(d))

EPA proposes to revise 40 CFR 122.44(d) to specify that a “reasonable potential” determination (explained below) must consider relevant qualitative or quantitative data, analyses, or other valid and representative information for pollutants or pollutant parameters that could support the need for effluent limitations for new discharges.

Where TBELs are not sufficient to attain applicable WQS, CWA section 301(b)(1)(C) requires that permits include any more stringent limits necessary to meet such standards. 40 CFR 122.44(d)(1). These limits are known as water quality-based effluent limits, or WQBELs. EPA regulations state that “[l]imitations must control all pollutants or pollutant parameters (either



conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any [s]tate water quality standard, including [s]tate narrative criteria for water quality.” 40 CFR 122.44(d)(1)(i). Based on this language, EPA refers to the process that a permit writer uses to determine whether a WQBEL is required in an NPDES permit as a reasonable potential analysis. NPDES PWM, 6.3.1. However, the current regulatory language is unclear regarding the types and quantities of data and information (including qualitative information) permitting authorities must consider when conducting a reasonable potential analysis. Because of this lack of clarity in the regulations, EPA has found that permitting authorities often defer the reasonable potential determination and development of WQBELs until a minimum data set has been collected. Permit reviews have also revealed a lack of reasonable potential determinations where quantitative data was not yet available, despite the availability of studies and effluent analyses for facilities with similar operations and effluent characteristics.

Permit writers must determine whether the limits and conditions of an NPDES permit are as stringent as necessary to attain any applicable WQS. CWA section 301(b)(1)(C). Once the permitting authority determines that a discharge causes, has the reasonable potential to cause, or contributes to an excursion above water quality criteria, 40 CFR 122.44(d)(1) requires the permitting authority to develop effluent limits to control the discharge of such pollutant(s). The cumulative impact of point and nonpoint sources on a water body may cause an excursion. In determining the need for a permit limit, the permitting authority must, at a minimum, consider existing controls on both point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the involved species to toxicity testing (when evaluating WET), and where appropriate, the effluent dilution in the receiving water. 40

CFR 122.44(d)(1)(ii). EPA's TSD specifically discusses conducting a reasonable potential evaluation in the "absence of effluent data." These factors include the type of discharge, the available dilution, the type of receiving water and designated use, existing data on toxic pollutants and the history of compliance problems and toxic impact. TSD 3.2. The NPDES PWM similarly suggests that permit writers use "any available effluent and receiving water data as well as other information pertaining to the discharge and receiving water," including type of industry, existing TBELs, compliance history and stream surveys. NPDES PWM, 6.3.2.

Consistent with this existing guidance and policy, this proposal would require the Director to make a reasonable potential determination based on relevant qualitative or quantitative data, analyses or other valid and representative information for pollutants or pollutant parameters that could support the need for effluent limitations. When determining effluent limitations for new dischargers where effluent data is not yet available, permitting authorities can use existing monitoring data and other studies that have been conducted at similar facilities. The existing application form(s) for new dischargers specifically require applicants to describe their planned flows, sources of pollution, and treatment technologies for each proposed outfall and to provide estimates of the concentrations of pollutants expected to be present in the effluent upon commencement of discharge. Applicants must also provide the name and location of any existing plant(s) which resemble the proposed facility with respect to production processes, wastewater constituents, or wastewater treatments. In addition, if an applicant is in an industrial category for which EPA has developed effluent limitations guidelines (ELGs), EPA has published development documents for every approved guideline<sup>20</sup> that provides detailed effluent

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<sup>20</sup> <http://www.epa.gov/eg/industrial-effluent-guidelines>

characterization data that can be used to estimate the types and quantities of pollutants that might be discharged.

This proposed revision would codify EPA’s long-standing policy that the permitting authority should consider available and relevant data and information (as described above) pertaining to the discharge in order to make an informed judgment.<sup>21</sup> This proposed change would ensure that permitting authorities consider a wide range of available information to characterize new and existing discharges to determine the need for permit limits that adequately protect WQS. This revision would not require collecting new data beyond that already required through permit applications and would ensure that the permitting authority is transparent in its decision-making process when determining the need for an effluent limit, even for applicants that have yet to commence discharge. This proposal would not require collecting new data. However, this proposed revision would codify EPA’s long-standing policy and guidance that, while the permitting authority has the discretion to prioritize the importance of available and relevant data and information used in making a determination on a case-by-case basis, it may not disregard valid information that is useful in conducting a reasonable potential analysis.

EPA seeks comments on this proposed revision to 40 CFR 122.44(d).

8. Best Management Practices (BMPs) (40 CFR 122.44(k)(4))

a) Contact Information

EPA is correcting publication contact information included in the Note to § 122.44(k)(4) by deleting outdated references to information sources that are no longer available to read:

“Additional technical information on BMPs and the elements of BMPs is contained in the

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<sup>21</sup> TSD section 3.2. See also Final Guidance on Appalachian Surface Coal Mining, 2011: “[i]n conducting a reasonable potential analysis, all valid representative qualitative and quantitative information regarding the effluent and receiving water should be used.”

following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. EPA guidance documents can be obtained through the National Service Center for Environmental Publications (NSCEP) at <http://www.epa.gov/nscep>. In addition, States may have BMP guidance documents.”

9. Anti-backsliding (40 CFR 122.44(l))

EPA proposes to revise 40 CFR 122.44(l) to incorporate the anti-backsliding provisions that are currently in the CWA and have not yet been incorporated into the NPDES regulations. As a general matter, the anti-backsliding provisions prohibit the renewal, modification or reissuance of an NPDES permit with effluent limitations that are less stringent than the effluent limitations that existed in the prior permit. Anti-backsliding requirements are found in the CWA in sections 402(o) and 303(d)(4) and in the NPDES regulations at 40 CFR 122.44(l).

EPA revised the existing regulatory language at 40 CFR 122.44(l) in January 1989 under the 1987 WQA. 54 FR 245. The WQA amended the CWA to include sections 402(o) and 303(d)(4).

EPA's 1989 regulatory revision did not, however, incorporate the entirety of the WQA's provisions on anti-backsliding. The proposed revision would incorporate into the NPDES regulations the omitted WQA anti-backsliding provisions applicable to effluent limitation.

The following is a list of the anti-backsliding sections and where EPA proposes to incorporate them into the regulation: the second sentence of CWA section 402(o)(1) would be incorporated into 40 CFR 122.44(l) as a new section 122.44(l)(2); the second sentence of CWA section 402(o)(2)(E) would be incorporated into 40 CFR 122.44(l) as a note at the end of § 122.44(l)(2); and CWA sections 303(d)(4)(A) and 303(d)(4)(B) would be incorporated into 40 CFR 122.44(l) as new §§ 122.44(l)(3)(i) and 122.44(l)(3)(ii), respectively. In each case, EPA is incorporating statutory language verbatim.

Since EPA is including anti-backsliding statutory language verbatim, EPA is not seeking comments on the added language or on the existing regulation.

#### 10. Design Flow for POTWs (40 CFR 122.45(b))

EPA proposes revisions to 40 CFR 122.45(b) to clarify that permit writers would be required to calculate permit effluent limits for POTWs using design flow only where the limits are based on technology standards. The revisions would provide permit writers with additional flow options for calculating WQBELs. The existing regulation applies to production-based limits and currently states that POTW permit effluent limitations, standards or prohibitions shall be calculated based on design flow. The current regulation at 40 CFR 122.45(b)(2)(i) provides that for dischargers other than POTWs, permit effluent limitations, standards or prohibitions shall be based upon "a reasonable measure of actual production of the facility." This has led to some confusion as to whether the requirement for POTW "production-based" limits should be applied to the calculation of WQBELs. This requirement pre-dates EPA's current WQBEL regulations

developed to address the 1987 WQA. The administrative record for the existing regulations provides no indication that the production-based requirement was intended to apply to the calculation of WQBELs.

The CWA does not provide any indication that WQBELs for POTWs should be derived in a manner that is distinct from other categories of dischargers. When determining the need for WQBELs or calculating WQBELs for any type of discharger, permitting authorities generally use data and analyses to predict the impact of a discharge on a receiving water. In conducting these analyses, permitting authorities use data (including effluent flow values) that most accurately reflect the conditions in the discharge and the receiving water. Because there is no inherent difference in the validity and process for modeling POTW versus non-POTW discharges, EPA has concluded that the option to use effluent flows other than design flow should be made available to permit writers when calculating WQBELs for POTWs.

Where the POTW limits are water quality-based, such limits could be based on effluent flows other than design flow (e.g., actual flow, estimated flow). Therefore, EPA proposes to clarify that permitting authorities developing WQBELs for POTWs have the same flexibility to base calculations on effluent flows as they do for the development of WQBELs for all other dischargers.

This option would be appropriate when modeling the impact of any type of pollutant, including when BOD and suspended solids are used as surrogate parameters for applicable WQS. Although this proposal would clarify this flexibility for POTWs, it is not intended to preclude or restrict a permitting authority from using the POTW design flow for the purpose of developing WQBELs. In many cases, the POTW design flow is a reasonable and appropriate value for use in water quality modeling, and this proposed clarification is not intended to discourage permitting

authorities from current practices under which design flow is used for WQBEL development. This proposed revision provides additional flexibility for permit writers in calculating effluent limitations and will not impose new burden.

EPA seeks comments on this proposed revision.

## B. Proposed Revisions to Part 123

### 1. Objection to Administratively Continued Permits (40 CFR 123.44)

EPA proposes revising 40 CFR 123.44 to allow EPA to designate certain administratively continued permits as “proposed permits.”

Section 402(d) of the CWA generally provides that authorized state NPDES permitting authorities should submit proposed state permits to the EPA Administrator for review and objection, where deemed appropriate. 40 CFR 123.44. MOAs between EPA and the authorized state provide the timeframe within which each EPA Regional Administrator (RA), to whom the review and objection duties have been delegated, may comment on or object to a proposed permit, up to 90 days from receipt of the proposed permit. Within this time period, the RA must submit to the State Director a statement of the reasons for any objection, and the effluent limitations and conditions that such permit would include if it were issued by the RA.

When a permittee has submitted a timely and complete renewal application but the State Director has not acted on the permittee’s application before the existing permit expires, state laws often provide that the existing permit continues in effect by operation of law until the state takes final action on the permittee’s application (that is, until the state makes a final decision to issue or not issue the new permit). This is often referred to as “administrative continuance.” These state laws, like the corresponding federal provisions in 40 CFR 122.6 and the federal Administrative Procedure Act (APA) at 5 U.S.C. § 558(c), aim to protect a permittee that has

submitted a timely and complete application for renewal from losing its authorization to discharge simply because the permitting authority did not issue a new permit before the existing permit expired.<sup>22</sup>

In some cases, administratively continuing expired permits provides states with flexibility to prioritize their action without significant adverse impacts on receiving waters. However, administrative continuance also can lead to inappropriate delays in reissuing permits that need revision to comply with current regulatory and statutory requirements and policy practices. State administrative continuance laws typically allow an expired permit to remain administratively continued indefinitely, which can significantly delay the implementation of revised or new effluent limitations (both technology-based and water-quality based). Under EPA's existing regulations, there is no mechanism by which to invoke EPA's permit review and objection authority to avoid indefinite delays in permit reissuance. A lengthy administrative continuance of a permit can significantly delay implementation of new effluent guidelines, WQS or TMDLs, and such a delay can affect a permitting authority's ability to protect water quality. As of September 2015, there were approximately 17,000 facilities covered by expired non-tribal and tribal permits (both state and EPA-issued, not including facilities covered by non-major stormwater permits).

Under this proposed revision, expired permits that have been administratively continued and are considered environmentally significant may be subject to objections by EPA regional offices. EPA would expect to exercise this authority only in very limited circumstances, such as for permits involving environmental and public health issues, where other means of working with the state to reissue an updated permit have failed. Under the current regulations, the RA may

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<sup>22</sup> 40 CFR 122.21(d)(2) requires that an existing permittee submit a new permit application 180 days before an existing permit expires.



review and object to an NPDES permit that an authorized state proposes to issue. 40 CFR 123.44. EPA proposes adding a new mechanism that grants the RA discretion to initiate these procedures where the state has not reissued an expired, administratively continued permit. The RA would have discretion to exercise this authority if a state does not produce a draft permit within a certain period of time, as described below. If a state has not reissued an expired, administratively continued permit, the state would be encouraged to explain to EPA the reasons for not reissuing the expired permit and EPA would carefully consider any such explanation before proceeding with an objection, as further described below.

Consistent with 40 CFR 122.6(d), which currently addresses administratively continued permits, the proposed regulation would apply to only those expired state-issued permits for which state law has provided for continuation of the expired permit. The new provision would not apply to expired permits that have not been administratively continued, nor would it apply to other unpermitted discharges. A similar regulatory change allowing for EPA objection to administratively continued permits, under certain conditions, was previously proposed, commented on and finalized as a part of EPA's July 2000 Total Maximum Daily Load (TMDL) Rule. 68 FR 13608. However, the final rule was withdrawn in March 2003 as a result of widespread controversy and disagreement over the rule and its legal authority, including a case filed in the D.C. Circuit Court.<sup>23</sup> It is important to note, however, that the TMDL rule and disagreement over its legal authority were not based on concerns regarding the proposed section on administratively continued permits. In fact, many of the comments received by EPA expressed support for this proposed revision. EPA received a number of comments stating that EPA has an obligation under the CWA to ensure that all state programs and state-issued permits

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<sup>23</sup> See, *American Farm Bureau Federation v. Whitman* (D.C. Cir. No. 00-1320 and consolidated cases).

comply with the requirements of the Act. Some expressed the view that the language proposed in the 2000 rule was unduly limited, because it would have limited EPA's review of expired permits to only those expired permits authorizing discharges to waters that do not attain and maintain WQS, and that EPA should be allowed instead to review and potentially object to, if necessary, all administratively continued permits, not just those permits for which WQS and TMDLs are of concern.

Given the current backlog of administratively continued state permits, EPA views this proposed revision as providing an important potential mechanism through which to carry out its authorities under the CWA. 33 U.S.C. 1361(a). Under CWA section 402(c)(2), authorized state programs must comply with the requirements of the Act including CWA section 402(b)(1)(B), which provides that NPDES permits may not be issued for periods exceeding five years. The purpose of this statutory limitation is to ensure that permits be reviewed and revised regularly by the state, and by EPA in its CWA 402(d) oversight role, to ensure compliance with the Act and its implementing regulations, including those pertaining to both TBELs and WQBELs.<sup>24</sup> The proposed revision would provide EPA with the ability to further this Congressional intent to protect water quality by ensuring that permitting authorities consider effluent guidelines, WQS, and TMDLs that have been promulgated since the existing administratively continued permit was issued.

EPA currently addresses expired, administratively continued permits through its "priority permits" measure. Priority permits are those permits that have been expired longer than two years, and which EPA has asked the permitting authority to target for reissuance. EPA's general

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<sup>24</sup> See 33 U.S.C. 1311(b)(1)(C) (requiring that "there shall be achieved...any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations...or any other federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act").

trigger for identifying priority permits is when a permit is expired two years (outlined in a 2004 memorandum from the Director of EPA's Office of Wastewater Management to EPA's Regional Water Division Directors on the topic of permit issuance, priority permits and permitting backlog).<sup>25</sup>

EPA proposes that an administratively continued permit could be designated as "proposed" after either a two-year or five-year period following the initial five-year permit term, and is seeking comment on which time frame is appropriate. A two-year period after which an administratively continued permit could be designated by EPA as "proposed" would be consistent with EPA's general trigger for identifying priority permits. EPA's view is that it is reasonable to consider a two-year delay as an indication that the state is unable to take action on the permit. A five-year period after which an administratively continued permit could be designated as "proposed" would allow for EPA to first address the administratively continued permit through the priority permits measure. A five-year expired permit would be designated as a priority permit after being expired for two years, and the state would have had at least three additional years to work on and reissue the permit. Additionally, a five-year expired permit would have been expired for an entire permit cycle. EPA's view is that it is reasonable for a state to take action to reissue a permit that has been expired and administratively continued for five years.

EPA expects to exercise its discretion to use this authority only in very limited circumstances, such as for particularly environmentally significant permits, to ensure that these expired permits may be reissued in a timelier manner and, when reissued, reflect the most current statutory and regulatory requirements. EPA has used the priority permits measure since 2004 to

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<sup>25</sup> Jim Hanlon, "Permitting for Environmental Results: Permit Issuance and Priority Permits," March 5, 2004, available at [http://www3.epa.gov/npdes/pubs/prioritization\\_memo3-5-04.pdf](http://www3.epa.gov/npdes/pubs/prioritization_memo3-5-04.pdf).

target administratively continued permits which should be a priority for reissuance. The parameters by which permits generally may be designated as priority permits were identified in the above referenced 2004 memorandum, which is included in this rule's docket. EPA is considering using similar parameters to identify permits for candidates for administratively continued permit objections. Under this approach, permits with the following significant adverse impacts, changes or issues could be potential candidates for the new objection process:

- New or revised water quality standards;
- New or revised effluent limitations guidelines;
- Potentially significant impacts to an impaired or threatened waterbody;
- Potentially significant impacts to a drinking water resource;
- National program priorities (e.g., Combined Sewer Overflow, Concentrated Animal Feeding Operations);
- Protection of threatened or endangered species;
- Significant changes to a facility's operations, treatment, or effluent characteristics; or
- Public concerns or environmental justice issues.<sup>26</sup>

Under the proposed provision, EPA would be required to give the state and the permittee notice of its intent to designate the administratively continued permit as a proposed permit submitted to EPA for review under 40 CFR 123.44. EPA proposes to give the state and the permittee 180 days' notice of its intent to designate an administratively continued permit as a proposed permit, and is requesting comment on whether this time frame is appropriate. This proposed provision would not create a new mechanism for EPA to take over a state's NPDES permit. During EPA's review of the "designated" proposed permit, the state permitting authority

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<sup>26</sup> Id.

may decide to proceed with the development of its own draft or proposed permit. EPA would encourage this effort, as the intent is always to have a state permitting authority reissue an administratively continued permit incorporating all of the appropriate terms and conditions. For this reason, the proposed amendment provides that if the state, under 40 CFR 123.43(a), submits a draft or proposed permit for EPA review at any time before authority to issue the permit would pass to EPA under 40 CFR 123.44(h), EPA would withdraw its designation of the administratively continued permit as a proposed permit. EPA would then review the state's draft or proposed permit in accordance with the 40 CFR 123.44 procedures. If, after EPA reviews the permit under 40 CFR 123.44, the state does not proceed with the timely issuance of the final permit (within 180 days of the completion of EPA's review), EPA may again determine that the state does not intend to reissue the permit and may reassert its previous determination that the administratively continued permit is to be designated as a proposed permit. EPA would then proceed with the review of the designated "proposed" permit at the point in the process where the state submitted its draft or proposed permit.

EPA is seeking comments on whether to make this proposed regulatory change. Specifically, EPA seeks comments on whether considering administratively continued permits as "proposed permits" under CWA section 402(d) would effectively achieve EPA's goal of more timely reissuance of state NPDES permits, or whether EPA should consider other regulatory mechanisms to achieve this goal. EPA is also seeking comment on the potential parameters or criteria that EPA could use to more clearly define or limit the scope of this administratively continued permit objection process, including but not limited to those described in the memorandum referenced above, and whether any such parameters or criteria should be included in regulatory language. Additionally, EPA seeks comments on whether two years, or five years,

or some other time period is the appropriate threshold at which EPA may designate an administratively continued permit as a proposed permit for the purposes of exercising its objection authority, and whether the proposed 180 days or some other period of time is an appropriate notice period for EPA to notify the state and permittee of its intent to designate the administratively continued permit as a proposed permit. Specifically, if commenters believe other time periods for designating proposed permits and providing notice would be appropriate, EPA requests comments describing the reasoning for such time frames.

### C. Proposed Revisions to Part 124

#### 1. Public Notice Requirements (40 CFR 124.10(c))

EPA proposes revising 40 CFR 124.10(c) to allow permitting authorities to provide public notice of permitting actions for NPDES major individual and general permits on the permitting authority's publicly available website in lieu of the newspaper publication requirement.

CWA section 402(b)(3) requires that notice be provided to the public, as well as any other state whose waters may be affected, of each NPDES permit application and that an opportunity be provided for a public hearing before ruling on each permit application. 33 U.S.C. 1342(a)(1). In addition, the statute provides that "public participation in the development, revision and enforcement of standard, effluent limitation, plan, or program established by the Administrator or any State under [the CWA] shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. 1251(e). EPA's regulations also address the issue of public participation in its programs. 40 CFR 124.10. 40 CFR Part 25 sets forth minimum requirements for public participation under the CWA, RCRA and SDWA. 40 CFR 25.4(b) explains that "providing information to the public is a necessary prerequisite to meaningful, active public involvement. Agencies shall design informational activities to encourage and

facilitate the public's participation in all significant decisions... particularly where alternative courses of action are proposed.” These minimum requirements are intended to be met not only by EPA but also by authorized states and state agencies. In clarifying the minimum requirements for public participation, 40 CFR Part 25 highlights that the requirements for public information, public notification and public consultation are “intended to foster public awareness and open processes of government decision making and are applicable to all covered activities and programs.” 40 CFR 25.3(c)(7) specifically emphasizes that agencies should “use all feasible means to create opportunities for public participation, and to stimulate and support participation.” Neither the CWA nor its implementing regulations specify the best or preferred method for providing notice to the public.

Currently, 40 CFR 124.10(c)(2)(i) requires notice of specified NPDES permitting activities, such as preparation of a draft permit, through publication “in a daily or weekly newspaper within the area affected by the facility or activity.” Indeed, publication of public notice in newspapers was appropriate when 40 CFR 124.10(c)(2)(i) was promulgated in 1982, 12 years before the internet became widely available for public and commercial use. Websites are often more appropriate avenues for widely disseminating information to the public and many states currently supplement the required newspaper publication by posting draft and final permits on their state websites.

EPA proposes revising 40 CFR 124.10(c) to allow permitting authorities (EPA, state, tribe and territories) to provide public notice for activities listed under 124.10(a) on the permitting authority’s publicly available website in lieu of the newspaper publication requirement. If a permitting authority exercises this option, the permitting authority would be required to meet all of the required elements of § 124.10(c) and also post all draft permits and fact sheets on the

website during the public comment period and post all final permits, fact sheets and response to comments on the website for the entire term of the permit. The purpose of this revision would be to provide states and EPA with an alternative method of providing notice of permit applications and hearings, and affirm flexibility in reaching the public through a variety of methods that would greatly expand public access to the draft and final permits and fact sheets.

This option would not in any way affect the requirements of 40 CFR 124.10(c)(1)(ix) which state that a copy of the notice must be mailed directly to persons who have joined the appropriate mailing list. This option also would not alter the original requirements of 40 CFR 124.10(c)(2)(i) if a permitting authority chooses to continue the traditional method of providing notice of an NPDES permit action in a newspaper publication. Also, this option would not alter the existing requirements for other types of permits covered in this section (i.e. RCRA, UIC, section 404). In addition, none of the other existing public notice regulatory requirements would be affected by this proposed revision to 40 CFR 124.10(c). The proposed revision is intended to supplement and expand EPA's efforts to reach communities through a variety of methods. By allowing each permitting authority to determine whether newspaper publication, internet notice, or a combination of these methods is the most effective method for its communities, EPA expects an increase in effective dissemination of information to communities and transparency.

Finally, nothing in the proposed revisions to 40 CFR 124.10(c) is intended to alter or affect the notice requirements for issuance of a final permit decision in 40 CFR 124.15. Section 124.10(a) establishes notice requirements as to certain enumerated actions, but those actions do not include "issuance" of a final permit decision, the requirements for which are established in 40 CFR 124.15. The inclusion in the proposed revision to 40 CFR 124.10(c) of an internet



posting requirement in certain circumstances for final permits is not intended to imply that internet posting fulfills the final permit decision notice requirements of 40 CFR 124.15.

EPA is seeking comment on an alternative option for revising 40 CFR 124.10(c) that would *require* NPDES permitting authorities to public notice *all* NPDES permits and hearings on the permitting authority's publicly available website. This option could be implemented over a period of time (e.g., within five years), and states would continue to have the flexibility to use print media and other methods in addition to the publicly available website. It could include a provision allowing NPDES permitting authorities the flexibility to solely use newspapers and other print media under certain circumstances such as in areas with limited broadband internet access, in areas with NPDES-regulated entities owned or operated by identifiable populations (e.g., Amish, Mennonite, and Hutterite) who do not use certain technologies (e.g., computers or electricity), and during large-scale disasters (e.g., hurricanes) or prolonged electrical system outages. Providing the permitting authority with the flexibility to phase in use of their public websites, as well as the ability to opt out of its use under certain circumstances, would be consistent with EPA's approach to required electronic reporting of NPDES information in its NPDES Electronic Reporting Rule in Part 127. Requiring permitting authorities to use their publicly available website to post all NPDES permit and hearing information could help advance EPA's commitment in its 2009 Clean Water Act Enforcement Action Plan and in its NPDES Electronic Reporting Rule to improve and enhance public access to information.

EPA is also seeking comment on whether proposed revisions to public notice requirements in 40 CFR 124.10(c) should be expanded to include NPDES non-major individual and general permits. This would increase public access to permit and hearing information on the entire NPDES-permitted universe.

In addition, EPA is seeking comments on ways in which NPDES permits and fact sheets could be posted electronically to make it easier for EPA's Enforcement and Compliance History Online (ECHO) information system to link to the permit fact sheets (e.g., one state posts NPDES permits on its web site by embedding the NPDES identification number into the URL).

Given the wide availability of the internet, it is EPA's view that publication through such means would be effective in informing the public of all such permit applications and hearings.<sup>27</sup> EPA is proposing that where the permitting authority opts to post this information on the website in lieu of newspaper publication, it must post all notices to its website to maintain one repository of public notice documents. EPA seeks comment on its proposal to require a permitting authority to post all notices on its website if it seeks to use its website in lieu of a newspaper notice for permit-related information.

A permitting authority that uses the web in lieu of a newspaper to post notices could realize significant financial savings and post more information over a longer period of time, fostering greater public access to information and greatly reducing state burden with regard to public notice. Providing the draft permit and fact sheet during the full public comment period and making the final permit electronically available over the lifetime of the permit can significantly increase the public's access to permitting information compared to the single-day newspaper notice and access to paper copies of the permit at the agency's office.

EPA has carefully evaluated the potential effect of this proposed revision on underserved communities with environmental justice (EJ) concerns. EPA consulted a recent study conducted

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<sup>27</sup> Courts have consistently recognized that the critical aspect of public notice is not the particular means of giving notice, but rather that the selected method is reasonably calculated to provide that notice. In discussing service of process by e-mail, the 9th Circuit Court has described in broad language a court's authority to adapt its procedures to meet technological advances as follows: "In proper circumstances, this broad constitutional principle [i.e., that the selected method of service must be reasonably calculated to provide notice and an opportunity to respond] unshackles the Federal courts from anachronistic methods of service and permits them entry into the technological renaissance." *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002).

by Native Public Media that found that the primary source for national and international news among Native American tribes is the internet.<sup>28</sup> Newspapers were listed as only the third most commonly used source for news. EPA also consulted the recently finalized National Environmental Justice Advisory Council (NEJAC), EJ in Permitting Subgroup Report.<sup>29</sup> The report states that “[n]otification of the public by publishing in the legal section of regional newspapers is antiquated and ineffective. This method should not be counted on to communicate, even if legally required.”<sup>30</sup> The NEJAC specifically listed website postings as a method to ensure meaningful public participation. Thus, based on the EJ in Permitting Subgroup Report’s results, EPA concludes that notice via the internet would be a viable and effective means of making information widely available to the public. Permitting authorities are encouraged to provide additional notice where the Director determines that a specific jurisdiction or population would be better served with notice by means of the internet or a newspaper.

EPA seeks comments on both the proposed revision and on the possible alternative option described.

## 2. CWA section 401 Certification Process (40 CFR 124.55(b))

40 CFR 124.55(b) addresses the circumstances under which a state may issue a modified CWA section 401 certification in connection with an EPA-issued NPDES permit and the effect of a modified section 401 certification on such a permit. Pursuant to this regulation, if a court of competent jurisdiction or an appropriate state board or agency invalidates a certification condition after final agency action on the permit, EPA can modify such permits only to delete

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<sup>28</sup>Morris, Traci L, and Sascha D. Meinrath. “New Media, Technology and Internet Use in Indian Country” Native Public Media, available at [http://www.atalm.org/sites/default/files/NPM-NAF\\_New\\_Media\\_Study\\_2009\\_small.pdf](http://www.atalm.org/sites/default/files/NPM-NAF_New_Media_Study_2009_small.pdf)

<sup>29</sup> See, “Enhancing Environmental Justice in EPA Permitting Program.” National Environmental Justice Advisory Council. April, 2011, available at <http://www3.epa.gov/environmentaljustice/resources/publications/nejac/ej-in-permitting-report-2011.pdf>

<sup>30</sup> Id., p.20.

state certification conditions upon request of the permittee. Under the current rule, EPA cannot modify already-issued permits to reflect state court, board or agency decisions that would require the state certifications (and arguably the federal permits subject to that certification) to include more stringent provisions.

The proposed revisions to 40 CFR 124.55(b) would broaden the circumstances under which federal NPDES permits can be modified after issuance to include the addition of permit conditions based on more stringent section 401 certification provisions that result from state administrative or judicial decisions.

Such permit modifications may be requested by anyone and not just the permittee. This change would recognize the importance of state administrative and judicial review process for CWA section 401 certifications by allowing decisions made by state administrative bodies and courts regarding challenges to state certification conditions to be fully reflected in the federal permit, even after the permit is issued. If, upon review, a state administrative body or court determines that more stringent section 401 certification conditions are necessary to adequately protect water quality or to be consistent with state laws, EPA would have the discretion to modify already-issued federal permits to include those more stringent conditions. It is EPA's view that its current ability to only delete section 401 certification-based permit conditions hinders its ability to ensure that permits are environmentally protective and that they reflect the most up-to-date state administrative and judicial determinations. EPA is not able to estimate the number of state administrative or judicial determinations there may be that determine that more stringent conditions are necessary. EPA therefore cannot predict how often this proposed provision may be used. However, it is EPA's view that even if used rarely, this provision would

be an important tool for EPA to be able to modify its permits in order to implement limits that better protect water quality.

EPA seeks comments on this proposed revision, including comments that estimate how often this provision may be used and on any anticipated impacts.

### 3. Fact Sheet Requirements (40 CFR 124.56)

EPA proposes to revise 40 CFR 124.56 to require specific documentation in the fact sheet developed to support an individual or general permit. Fact sheets, required for major NPDES permits and general permits per 40 CFR 124.8, “sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit.” NPDES PWM, 11.2.2. The existing regulations at 40 CFR 124.56 contain basic requirements for information that must be presented in a fact sheet. It is EPA’s view that more precisely outlining the required fact sheet information would result in more comprehensive and focused fact sheets, and correspondingly, would facilitate more efficient, transparent and effective documentation of permitting decisions.

The proposed revisions to 40 CFR 124.56(a) are in two parts – one part for individual permits and one part for general permits. This accommodates differences in the information that permit writers use to develop effluent limits and conditions for individual facilities versus the information used to develop effluent limits and conditions for multiple facilities covered under one general permit.

EPA specifically seeks comments on proposed revisions to fact sheet requirements, as described below.

#### a) 40 CFR 124.56 Revisions to Fact Sheet Contents

##### 40 CFR 124.56(a)

An NPDES permit is developed based on careful consideration of existing data and available information relevant to the potential discharge. While the permit itself contains the terms and conditions required of the permittee, the rationale and basis for the decisions made in developing those terms and conditions are contained within the fact sheet and administrative record for that permit. The existing regulations at 40 CFR 124.56 contain basic requirements for information that must be presented in a fact sheet.

However, EPA reviews of state-issued NPDES permits within the past ten years have identified widespread deficiencies in state fact sheet quality. Many fact sheets do not meet the requirements of the existing regulations. Currently, many fact sheets omit critical information regarding limitation development, such as available water quality data, impairment status, existence and implementation of TMDLs and implementation of antidegradation policies. Furthermore, while the existing regulation at 40 CFR 124.56(a) requires fact sheets to generally include “calculations and other necessary explanation,” it does not explicitly identify what is required in terms of “calculations” or “other necessary explanation.” Fact sheet quality and clarity affects permittees’ and the public’s ability to meaningfully participate in the permitting process. It is EPA’s view that the public and permit applicants should have access to a clear and transparent record of the permit decision making process. By clearly explaining what the 40 CFR 124.56(a) “calculations and other necessary explanations” requirement means, this proposed revision would enable all NPDES permitting authorities to know precisely the kind of thorough and transparent explanations fact sheets should contain to create this clear record. EPA also expects that these clarifications will enable permittees and other members of the public to more easily understand the permit limit development record.

Where the proposed regulation requires an “explanation,” “information sufficient,” “discussion” or a “description,” the proposed language in 40 CFR 124.56(a) allows the fact sheet to include a brief summary of the required information along with a specific reference to the source document in the administrative record. This would relieve the permitting authority from repeatedly providing this information. EPA is clarifying, however, that where the proposed regulations require a “citation” or “identification,” a summary would be inappropriate and the fact sheet would need to provide the specific information required. It is EPA’s view that this would eliminate redundancy, reduce permit writer workload in fact sheet development, and ensure that the permitting authority is clearly demonstrating and making available all required information. The proposed changes to the regulations would address observed deficiencies and explicitly require fact sheets to include the information necessary to understand the rationale behind permit development.

b) Fact Sheet Requirements for Individual NPDES Permits

The existing regulations at 40 CFR 124.56 provide basic fact sheet requirements for NPDES permits. While the regulations provide the requirements for content of these fact sheets, they lack specificity, which has led to fact sheets with very little or inconsistent justification of the permit terms and conditions. The proposed regulations would provide specific requirements for both individual and general permits, to provide permit writers with more detail on what information to include in fact sheets.

i. 40 CFR 124.56(a)(1)(i)

The current fact sheet regulation at 40 CFR 124.56(a) requires “a citation to the applicable effluent limitation guideline (ELG), performance standard, or standard for sewage sludge use or disposal as required by 40 CFR 122.44.” EPA proposes to redesignate this provision for citations

from the existing paragraph (a) as proposed paragraph (a)(1)(i) to allow the inclusion of additional provisions in paragraph (a) in a logical manner.

ii. 40 CFR 124.56(a)(1)(ii)

40 CFR 124.56(a) currently requires fact sheets to include “any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions or standards.” The current regulations do not provide any further clarification regarding what constitutes “calculations or other necessary explanation.”

The proposed paragraphs (ii)(A) and (ii)(B) would require the fact sheet to contain the name of the receiving water and include explicit reference to the applicable state WQS. EPA intends to provide information to the public and the permittee on designated uses of the receiving water(s) and to provide a clear reference to the applicable numeric and narrative criteria for the specific receiving water segment. In order to write WQBELs, permit writers must already consider the receiving water and applicable state WQS, and already has this information available. Explicitly documenting this known information in a fact sheet would add only a minimal burden, and the permit writer would not have any additional burden of obtaining new information.

The proposed paragraphs (ii)(C) and (ii)(D) would require the fact sheet to include information regarding the condition of the receiving water(s), including whether the water body has been listed as impaired or threatened for any uses. Where the water body is impaired, the fact sheet must indicate whether EPA has approved or established a TMDL for any of the impairing pollutants or pollutant parameters. This requirement is intended to ensure that the permitting authority has considered the condition of the receiving water as part of the permit development process and provides additional transparency regarding the rationale for permit conditions. When developing WQBELs, permit writers are already required to consider the condition of the



receiving water(s), any impairments, and whether there is a TMDL for the receiving water.

Because the permit writer already has this information available, it should add only a minimal burden to document this information in a permit fact sheet.

iii. 40 CFR 124.56(a)(1)(iii)

The proposed paragraph (iii) would require the fact sheet to include the rationale for TBELs developed pursuant to 40 CFR 122.44(a), and an explanation of any best management practices (BMPs) required pursuant to 40 CFR 122.44(k). This explanation should include a discussion of whether any ELGs apply to the facility, and if so, which performance standard(s) (e.g., best practicable control technology currently available (BPT), best available technology economically achievable (BAT), best conventional pollutant control technology (BCT), or new source performance standard (NSPS)) apply to the facility's discharge. The permit writer would already have all of the required information regarding ELGs, performance standards, technology, and BMPs that he or she used to develop TBELs. There would be no additional burden to obtain any new information, and only a minimal burden to document the analyses that the permit writer has already conducted.

iv. 40 CFR 124.56(a)(1)(iv)

The proposed paragraph (iv) would require documentation of the reasonable potential determination, and, where necessary, the development of WQBELs pursuant to 40 CFR 122.44(d).

The proposed paragraph (iv)(A) would require the fact sheet to describe the pollutants or pollutant parameters analyzed in order to determine a need for WQBELs. EPA's review of state-issued permits has found that even where fact sheets contained reasonable potential determinations and WQBEL calculations, they frequently contain little discussion or

demonstration regarding how the permitting authority established the “pollutants of concern” list. EPA is proposing this new paragraph to ensure that the permitting authority considers and clearly identifies “pollutants of concern” for the purposes of water quality analyses, and provides a rationale for the decision reached. Permit writers already have the information that they use to identify pollutants of concern, complete a reasonable potential analysis and develop WQBELs, so this proposed revision would not impose any additional burden of collecting new information. It should be only a minimal additional burden for a permit writer to document the calculations and analyses that he or she has already conducted.

The proposed paragraph (iv)(B) would require the fact sheet to provide the ambient (receiving water) pollutant concentration data, or an explanation of why such data is not applicable or available, for pollutants granted a dilution or mixing allowance pursuant to 40 CFR 122.44(d)(1)(ii). The “background” concentration of a pollutant in the receiving water is a critical factor in determining the assimilative capacity of the receiving water. EPA’s review of state-issued permits conducted over the past ten years found that fact sheets contained little information regarding background pollutant data, and little explanation regarding how permitting authorities used or did not use background data in limit calculations. This proposed requirement is intended to provide additional transparency with respect to the use of ambient pollutant concentration data in water quality assessments, reasonable potential determinations and permit limit calculations. In order to write permit limits, the permit writer would have already considered background pollutant data, so this proposed revision would not impose any additional information collection burden, and would only impose a minimal burden for documenting analyses that the permit writer has already conducted.

The proposed paragraph (iv)(C) would require that the fact sheet discuss any dilution or mixing considered in water quality evaluations or permit limit development, and where dilution or mixing were considered, how ambient (background) pollutant concentrations were considered in the water quality assessment. This requirement relates to the proposed requirement in paragraph (iv)(B) and is intended to ensure that the permitting authority has considered and justified the appropriateness of any dilution or mixing allowance consistent with provisions of state WQSs. In order to determine a mixing zone or dilution analysis, the permit writer would have already considered background pollutant data. This proposed revision would not impose any additional information collection burden, and would only impose a minimal burden for documenting analyses that the permit writer has already conducted.

The proposed paragraph (iv)(D) would require that where an EPA-approved or established TMDL has assigned a WLA to the point source, the fact sheet must describe how the permit incorporates limits and permit conditions consistent with the assumptions of any WLA assigned to the applicant/permittee discharge. This requirement is based on findings from both EPA's review of state-issued permits and a 2007 Office of Inspector General (OIG) report<sup>31</sup> that found limited documentation in permits to demonstrate the implementation of WLAs from approved TMDLs. In order to write permit limits that comply with 40 CFR 122.44(d)(1)(vii)(B), permit writers should already have considered information from applicable TMDLs and the assumptions of any WLAs. This proposed revision would not impose any burden on the permit writer to obtain new information and may impose only a minimal burden for documenting the analysis the permit writer would have already conducted.

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<sup>31</sup> Office of Inspector General, "Total Maximum Daily Load Program Needs Better Data and Measures to Demonstrate Environmental Results." September 19, 2007, available at <http://www.epa.gov/sites/production/files/2015-11/documents/20070919-2007-p-00036.pdf>

The proposed paragraph (iv)(E) would require the fact sheet to provide a description of how the permit ensures compliance with applicable state narrative water quality criteria and standards, where a reasonable potential determination has been made for an excursion of narrative water quality criterion. The regulations at 40 CFR 122.44(d)(1) specifically require permits to include limits and conditions that achieve WQS, including any state narrative criteria for water quality. EPA's review of state-issued permits related to the surface coal mining sector as well as other reviews of state-issued permits informed EPA that fact sheets rarely discuss whether or how the permitting authority has assessed the need for, or developed, WQBELs or other permit conditions to ensure compliance with narrative criteria. Permit administrative records are also unclear regarding how narrative criteria related to nutrients are assessed and implemented. EPA is proposing this new requirement to ensure that permitting authorities have considered narrative criteria during the permit development process and have documented how these criteria are implemented in the NPDES permit. In order to develop WQBELs, permit writers are already required to consider state narrative water quality criteria and standards and to conduct a reasonable potential analysis. This proposed revision would not impose any additional burden on the permit writer to obtain new information, and may impose only a minimal burden for documenting analyses that the permit writer has already conducted.

v. 40 CFR 124.56(a)(1)(v)

Fact sheets frequently do not adequately document the antidegradation analysis to ensure that the permitting authority is meeting requirements to protect existing uses and high quality waters (where applicable). In particular, fact sheets often omit information regarding whether the permitting authority conducted a "Tier 2" review consistent with the state's antidegradation requirements in order to demonstrate that allowing a lowering of water quality was consistent

with the state's antidegradation requirements. Numerous state NPDES permit challenges have raised this issue. The proposed language would ensure that the permitting authority has considered the applicable antidegradation requirements and has documented that the state's antidegradation requirements are met (e.g., by documenting a Tier 2 review, if applicable). The proposed paragraph (v) would require that the fact sheet contain sufficient information to demonstrate that the proposed discharge is consistent with the state's antidegradation requirements. In order to develop WQBELs, permit writers must already take state WQS into account. State antidegradation policies and requirements are a component of state WQS. This proposed revision would not impose any additional requirements on permit writers to collect new information or conduct new analyses. It may impose only a minimal burden for documenting analyses that permit writers have already conducted.

vi. 40 CFR 124.56(a)(1)(vi)

c) EPA's review of state practices and policy has shown that the determination of monitoring location(s), the frequency at which the permit requires the permittee to sample and analyze each regulated pollutant, the sampling technique (e.g., grab, composite, continuous), and the required analytical methods are all often carried forward from permit to permit with little or no explanation as to their basis or appropriateness. Further, the NPDES permitting regulations at 40 CFR 122.44(i) were revised in 2014 and now require permitting authorities to prescribe (where necessary) an analytical method that is "sufficiently sensitive" to assess compliance with applicable effluent limitations. The proposed paragraph (vi) would require the fact sheet to discuss the proposed monitoring and reporting conditions of a draft NPDES permit that current fact sheet regulations do not currently specifically address, including assurance that the prescribed analytical methods meet the requirements of 40 CFR 122.44(i). Permit writers already

have the data that they use to establish monitoring and reporting requirements and ensure that they are prescribing sufficiently sensitive methods are prescribed. This proposed revision would not impose any additional burden on permit writers to collect new information or conduct new analyses. It may impose only a minimal burden for documenting analyses that permit writers have already conducted.

d) Fact Sheet Requirements for NPDES General Permits

While current fact sheet regulations at 40 CFR 124.8(a) require development of fact sheets for draft NPDES general permits, the regulations at 40 CFR 124.56 do not include requirements specific to the contents of fact sheets for these permits. General permits are “umbrella” permits that cover classes or categories of dischargers, and are usually used when there are multiple facilities that have very similar discharges. General permits are an efficient tool used by permitting authorities to provide permit coverage for many facilities under just one permit. Fact sheets for general permits are especially essential in providing the rationale for the development of terms and conditions for general permits and provide applicants and the public with background and information on how the limits, terms and conditions in the permit were developed. Because of the unique nature of general permits, EPA believes that the regulations should describe the specific fact sheet requirements that more accurately describe and document the development of the terms and conditions of general permits.

EPA proposes the following new 40 CFR 124.56(a)(2) to address the specific information necessary to document permitting decisions for NPDES general permits. The proposed general permit fact sheet requirements closely track the general permit structure in 40 CFR 122.28.

i. 40 CFR 124.56(a)(2)(i)

Proposed paragraph (a)(2)(i) would require the fact sheet for a general permit to contain a description of how the issuance of the general permit meets the requirements of 40 CFR 122.28, including the geographic area of coverage: the types, classes or categories of waters to which the general permit authorizes discharge and the sources that the general permit would cover. This information would ensure that the permitting authority provides a transparent record of the types of facilities covered under the general permit and the criteria under which categories or classes of facilities were identified. Furthermore, the fact sheet would be specifically required to provide a record of decision for selecting the geographic area of coverage, including any areas or water bodies where general permit coverage is not available. In order to develop a general permit, permit writers will have already considered all of the relevant data regarding the geographic area of coverage and the kinds of facilities and discharges that the general permit covers. This proposed revision would impose no new burden on permit writers to obtain new information or conduct new analyses. It may impose only a minimal burden to document the analyses that permit writers have already conducted.

ii. 40 CFR 124.56(a)(2)(ii)

The current fact sheet regulation requires “a citation to the applicable effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by § 122.44.” The proposed paragraph moves the original language into paragraph 124.56(a)(2)(ii) and would not substantively change the existing requirement.

iii. 40 CFR 124.56(a)(2)(iii)

The proposed paragraph (iii) requires that the fact sheet provide the rationale for TBELs developed pursuant to 40 CFR 122.44(a), and an explanation of any BMPs required pursuant to 40 CFR 122.44(k). This explanation would include a discussion of whether any ELGs apply to

the facility, and if so, which performance standard(s) (e.g., BPT, BAT, BCT, NSPS) apply to the facility's discharge. The permit writer would already have all of the required information regarding ELGs, performance standards, technology, and BMPs that he or she used to develop TBELs. There would be no additional burden to obtain any new information, and only a minimal burden to document the analyses that the permit writer has already conducted.

iv. 40 CFR 124.56(a)(2)(iv)

The proposed paragraph (iv) deals with documentation of the reasonable potential determination and, where necessary, the development of WQBELs or conditions. Because general permits cover facilities that may be widely dispersed across multiple water bodies and watersheds, the water quality analysis would likely differ significantly from the site-specific type of analysis performed for an individual discharger. Therefore, fact sheet requirements must account for the unique approaches taken in general permits to ensure compliance with state WQS. However, while the approaches and rationales may differ, paragraph (iv) would require that the fact sheet provide a rationale that describes how the permit will ensure compliance with state WQS, which includes consideration of applicable state antidegradation policies and applicable WLAs from EPA-approved or established TMDLs. In order to develop WQBELs for general permits that ensure compliance with state WQS, permit writers will have already considered relevant analytical data pertaining to WQS (including antidegradation policies and requirements) and TMDLs. This proposed revision would not impose an additional burden on permit writers to collect any new data or perform additional analyses, and may impose only a minimal burden for the permit writer to document the analyses he or she has already conducted.

v. 40 CFR 124.56(a)(2)(v)



The proposed paragraph (v) addresses documentation of monitoring and reporting provisions of a draft NPDES general permit that current fact sheet regulations do not currently specifically address. Based on past practices and state policy, determination of monitoring location(s), the frequency at which the permit requires the permittee to sample and analyze each regulated pollutant, the sampling technique (e.g., grab, composite, continuous) and the required analytical methods are all often carried forward from permit to permit. Further, the NPDES permitting regulations at 40 CFR 122.44(i) were revised in 2014 and now require permitting authorities to prescribe (where necessary) an analytical method that is “sufficiently sensitive” to assess compliance with applicable effluent limitations. The proposed paragraph (v) would require that the fact sheet provide a discussion of proposed monitoring and reporting conditions, including assurance that prescribed analytical methods meet the requirements of 40 CFR 122.44(i). Permit writers already have the data that they use to establish monitoring and reporting requirements and ensure that they are prescribing sufficiently sensitive methods are prescribed. This proposed revision would not impose any additional burden on permit writers to collect new information or conduct new analyses. It may impose only a minimal burden for documenting analyses that permit writers have already conducted.

vi. 40 CFR 124.56(a)(2)(vi)

The proposed paragraph (vi) would require that the fact sheet provide an explanation of the administrative elements of the general permit, including the process by which a facility would seek and be granted coverage under the general permit. Where the general permit does not require a NOI, the fact sheet must also provide a description of why the NOI process is inappropriate in accordance with the criteria established in 40 CFR 122.28(b)(2)(v). Permit writers already include NOI provisions in general permits, so documenting these processes in

fact sheets would not impose an additional burden on permit writers to develop a new process, and may impose only a minimal burden to document this process in the fact sheet.

EPA requests comments on the proposed revisions to § 124.56(a).

e) Other revisions to 40 CFR 124.56

i. 40 CFR 124.56(b)(1)(vii)

40 CFR 124.56(b)(1) mandates an explanation of why a draft permit includes particular conditions. The proposed rule would include a requirement to provide a rationale for the use of compliance schedules in fact sheets for draft NPDES permits. In 2007, EPA addressed concerns over the use of compliance schedules in draft permits through a memorandum titled, “Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits” from James A. Hanlon, Director of EPA’s Office of Wastewater Management, to Alexis Strauss, Water Division Director of EPA Region 9.<sup>32</sup> The memorandum clarifies, “[w]hat principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations.” Paragraph (b)(1)(vii) of the proposed regulatory revision requires the draft permit fact sheet to contain an explanation and justification for the use of a compliance schedule in any draft NPDES permit. The appropriateness of a compliance schedule is a permit-specific determination. The NPDES regulations at 40 CFR 122.47 contain requirements for compliance schedules. The intent of this new provision is to ensure that the permitting authority has considered the appropriateness of the compliance schedule in light of the criteria established in the regulations at 40 CFR 122.47 and described in the 2007 EPA memorandum, and has documented these decisions in the fact sheet. If a permit contains a compliance schedule, permit writers should have already considered

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<sup>32</sup> James Hanlon. “Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits” May 10, 2007, available at [http://www3.epa.gov/npdes/pubs/memo\\_complianceschedules\\_may07.pdf](http://www3.epa.gov/npdes/pubs/memo_complianceschedules_may07.pdf)

whether the compliance schedule meets the requirements of 40 CFR 122.47. This proposed revision would not impose a new burden on permit writers to collect new data or perform new analyses, and may impose only minimal burden on permit writers to document analyses that they have already conducted.

ii. 40 CFR 124.56(c)

The current provisions of paragraph (c) require, when appropriate, a sketch or detailed description of the location of the discharge or regulated activity. The proposed rule would add to this paragraph a requirement that the fact sheet provide geographic coordinates (e.g., latitude and longitude) for each discharge or regulated activity. This locational information is already required to be provided by the applicant for an NPDES permit through its individual permit application. 40 CFR 122.21. Including this information as part of the fact sheet would provide the public with better information regarding the precise location of the regulated activity and would facilitate the use of internet-based geo-locational tools.

With respect to NPDES general permits, locational information is generally provided through the Notice of Intent (NOI) submitted by a facility after issuance of the general permit. The fact sheet for the general permit would include a description of the geographic area within which facilities may seek coverage under the general permit. This is consistent with the existing requirement in 40 CFR 122.28(a)(1) which requires the general permit to establish the geographical “area” within which coverage under the general permit may be sought.

This revision would not increase the level of effort for permittees and would not alter the requirements for data submission as part of the permit application process. The changes also would not alter the current substantive requirements for developing NPDES permits, but rather

would more clearly specify the information required for the documentation of how those requirements were developed.

EPA seeks comments on the proposed revisions to 40 CFR 124.56(b) and (c).

#### D. Proposed Revision to 40 CFR Part 125

##### 1. Deletion of 40 CFR 125.3(a)(1)(ii)

EPA proposes to delete 40 CFR 125.3(a)(1)(ii) from the NPDES regulations. The statutory authority supporting this provision was repealed in 1981 making this requirement no longer applicable to POTWs covered under NPDES permits. Public Law 97-117. Therefore, EPA proposes to remove this provision from the regulations in order to avoid confusion regarding its applicability.

Since EPA is removing language to be consistent with repealed statutory language, EPA is not seeking comments on the proposed removal or on the existing regulation.

#### **IV. Impacts**

This proposal involves numerous revisions to the NPDES regulations. It is EPA's view that these revisions would generally not result in a new or increased impacts or information collection by authorized states or the regulated community. EPA expects that any additional effort for documenting existing analyses and calculations would be minimal. It is also EPA's view that in some cases, these proposed revisions could reduce burden: deleting outdated information and requirements could make it easier for the public to understand which NPDES regulations apply. The impacts assessment is provided for each topic. EPA specifically requests comments on the impacts and estimated level of effort resulting from the totality of this proposal as well as the individual requirements of the proposal.

In general, revisions may result in a state having to make statutory or regulatory revisions in order to maintain a program that is at least as stringent as the federal program. Existing Information Collection Requests (ICRs) related to the NPDES regulations account for program revisions where they are necessary because the controlling federal statutes or regulations were modified. This proposal does not impose any changes to the procedures for revising state programs at 40 CFR 123.62 and it would not result in a new or increased effort beyond what has already been accounted for in the existing ICRs.

#### Purpose and Scope of the NPDES Program (40 CFR 122.1)

The revision to this note is being made to inform the public of ways to contact the NPDES program and would not result in changes to the existing program or program requirements. The note in the existing regulation contains an outdated address and telephone number for the Office of Water. Providing updated information will save the permitting authorities and the public time when they seek to contact EPA about these regulations.

#### NPDES Program Definitions: Pesticide Applications to Waters of the United States, New Discharger, Proposed Permit, and Whole Effluent Toxicity Definition (40 CFR 122.2)

The proposed revisions to the NPDES program definitions at 40 CFR 122.2 for “pesticide applications to waters of the United States,” “new discharger,” “proposed permit” and “whole effluent toxicity” would not result in an increase in effort or information collection. These revisions are being made to improve programmatic clarity and would not result in substantive changes to the existing program or program requirements.

Adding a definition of “pesticide applications to waters of the United States” brings the NPDES definitions into concert with the way the PGP has been interpreting and regulating such

applications since 2011. This definition would not increase burden and would not expand the universe of permittees and activities that the PGP covers.

EPA proposes correcting a typographical error in subsection (d) of this definition by changing "NDPES" to "NPDES." This will not increase burden and will enable the public to clearly understand EPA's regulations.

It is EPA's view that the revised definition of "proposed permit" also would not add any burden. This definition would correlate with the changes EPA proposes regarding objection to administratively continued permits. EPA proposes that an administratively continued permit could be designated as "proposed" after either a two-year or five-year period following the initial five-year permit term. Under the proposed revisions, EPA could then object to these proposed permits according to the existing permit objection regulations at 40 CFR 123.44. Although this revised definition could increase the number of permits to which EPA could object, EPA does not anticipate that this revised definition would increase burden for states, permittees, or any other stakeholders. Permittees will have already submitted the required permit renewal applications in a timely manner. After EPA designates an expired, administratively continued permit as a "proposed permit," the state NPDES permitting authority can choose to issue its own new draft permit based on the permittee's timely application, and the state permitting process would proceed as usual. If the state permitting authority were to choose not to issue its own new draft permit, EPA could issue the permit and would assume any additional workload.

The revised definition of WET would reflect current implementation practice and would impose no additional burden. The revised definition would clarify that WET includes both acute (lethal) and chronic (lethal and sublethal) WET test endpoints. As discussed in section III of this preamble, this clarification would be consistent with EPA's existing WET interpretation and

implementation. Clarifying this definition would not change the existing requirement that NPDES permits include WET limits where necessary to meet state numeric and narrative water quality aquatic life protection criteria. 40 CFR 122.44(d)(1)(iv) and (v).

#### Vessels Exclusion (40 CFR 122.3(a))

The proposed revision to 40 CFR 122.3(a) to remove an outdated provision related to vessel discharges would not result in an increase in effort or information collection. This proposed revision would incorporate or otherwise address CWA provisions that were enacted after the current regulations were promulgated as well as a judicial decision vacating the 40 CFR 122.3(a) exclusion for discharges incidental to the normal operation of a vessel from NPDES permitting. As a result, this proposed revision would not result in a new or increased effort and would not change the universe of permittees covered by the existing VGP.

#### Application Requirements (40 CFR 122.21)

The proposed revision to 40 CFR 122.21 related to updates and clarifications to the existing application requirements and corresponding forms would not result in an increase in effort or information collection. EPA is revising several data fields to refine the content and improve the consistency among the forms, to improve the consistency with EPA's current data standards, and improve the clarity and usability of the forms. It is EPA's view that the new application forms would be easier to use and understand, and may result in a decrease in effort for permittees applying for coverage. EPA also expects that the revisions would improve the quality of information being collected, which may reduce the need for follow-up questions and data requests, and the time necessary for the state to develop a permit.

In 2008, EPA submitted an ICR to the Office of Management and Budget (OMB) that, in part, updated EPA's estimates for applicants to complete Forms 1, 2A, 2C–2F, and 2S and for

permitting authorities to review applications for point source and sewage sludge management permits.<sup>33</sup> The renewal ICR did not include updated estimates for Form 2B or for forms associated with cooling water intake structures (item 8 in table IV–1). Updated estimates to complete those forms were contained in separate ICRs.<sup>34</sup> The existing ICRs include annual estimates for completing NPDES permit applications and for conducting ongoing compliance monitoring for both new and existing NPDES permittees.

In the final rule, EPA will submit to OMB an updated ICR that describes the estimated effort associated with the proposed revisions made to the application regulations and forms. The changes proposed in this rule are minor, and do not change the estimated burden for completing the forms established in the existing ICRs.

#### Antidegradation Reference (40 CFR 122.44(d))

The proposed revision to 40 CFR 122.44(d) would include a reference to 40 CFR 131.12 in order to ensure consistency with the state antidegradation requirements established under that section and would not result in an increase in level of effort or information collection. This addition clarifies that permitting authorities should use applicable antidegradation requirements when deriving WQBELs. All state water quality standards include antidegradation policies. EPA's longstanding policy has been that permitting authorities should develop NPDES permit

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<sup>33</sup> USEPA, "Information Collection Request (ICR) for National Pollutant Discharge Elimination System (NPDES) Program (Renewal)," OMB Control No. 2040-0004, EPA ICR No. 0229.19, December 2008.

<sup>34</sup> USEPA, "Supporting Statement for the Information Collection Request for the NPDES Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations," OMB Control No. 2040-0250, EPA ICR No. 1989.04, June 2006.

USEPA, "Information Collection Request (ICR) for Cooling Water Intake Structures at Phase III Facilities (Final Rule)," OMB Control No. 2040-0268, EPA ICR No. 2169.02, February 2009.

USEPA, "Information Collection Request (ICR) for Cooling Water Intake Structures Phase II Existing Facilities (Renewal)," OMB Control No. 2040-0257, EPA ICR No. 2060.03, May 2007.

USEPA, "Information Collection Request (ICR) for Cooling Water Intake Structures New Facility Rule (Renewal)," OMB Control No. 2040-0241, EPA ICR No. 1973.04, June 2008.



terms and conditions consistent with, and in consideration of applicable state antidegradation requirements. NPDES permit writers are already required to consider how the final WQBELs established in the permit not only derive from the numeric and narrative water quality criteria, but also how they satisfy the antidegradation elements of state WQS. This would remain the case regardless of whether EPA includes this provision as a reminder. Because the NPDES regulations do not presently explicitly include this requirement, this proposal would revise the regulations at 40 CFR 122.44(d)(1) to explicitly clarify this existing assumption. This proposed revision would not result in a new or increased effort.

#### Dilution Allowances (40 CFR 122.44(d))

The proposed revisions to 40 CFR 122.44(d) specify that a dilution allowance under this paragraph must comply with applicable dilution and mixing zone requirements and low flows established in state WQS and be supported by data or analyses quantifying or accounting for the presence of each assessed pollutant or pollutant parameter in the receiving water. This proposal would not require collecting new information or conducting any new calculations, but rather is intended to ensure transparency in the permitting authority's decision to grant a dilution allowance. The information necessary to support a dilution allowance may be based on existing information, or the permitting authority may choose to ask the applicant seeking coverage for more information. This proposed revision would not require new or increased effort or costs.

#### Reasonable Potential Determinations for New Discharges (40 CFR 122.44(d))

The proposed revision to 40 CFR 122.44(d) specifies that a reasonable potential determination must consider applicable qualitative or quantitative data, analyses or other valid and representative information for pollutants or pollutant parameters to support the need for effluent limitations, conditions or standards. This proposal does not require collecting new

information, but rather is intended to ensure that the permitting authority uses all available information when determining the need for an effluent limitation for a new discharge. In addition, the revision ensures that the permitting authority is transparent regarding the process used to make the determination by including documentation in the permit fact sheet. This proposed revision would not result in a new or increased effort.

#### Anti-backsliding (40 CFR 122.44(l))

The proposed revision to 40 CFR 122.44(l) to be consistent with CWA section 402(o) provisions regarding “anti-backsliding” from permit limitations would not result in an increase in effort or information collection. This revision would incorporate the existing statutory requirement into the regulations verbatim and would not create any new requirements or information collection burdens.

#### Design Flow for POTWs (40 CFR 122.45(b))

The proposed revision to 40 CFR 122.45(b) would clarify that permit effluent limitations based on technology standards for POTWs must be calculated using design flow. This revision also clarifies that the permitting authority has the flexibility to use other appropriate measures of a representative critical condition when developing effluent limitations based on WQS for a POTW. A WQBEL for a POTW could instead be based on effluent flows other than design flow (e.g., actual flow, estimated flow). EPA proposes to clarify that permitting authorities developing WQBELs for POTWs have the same flexibility to base calculations on effluent flows as they do for the development of WQBELs for all other dischargers. This proposal would not impose any additional burden or require any additional calculations.

#### Objection to Administratively Continued Permits (40 CFR 123.44)

The proposed revision to 40 CFR 123.44 to allow EPA to review an administratively continued permit as a proposed permit for the purposes of making an objection determination would not result in an increase in effort or information collection. The proposal would not change the existing timeframes established in the permit objection regulations and would not require any new information to be submitted to EPA as a part of the process. It also would not impose additional burdens on authorized state NPDES programs, who have the responsibility to timely issue NPDES permits. If EPA were to invoke the authority in this proposed provision, the responsibility to issue the permit could potentially shift to EPA. This proposed revision would not result in a new or increased effort for states. See impacts explanation for “proposed permit” in “Definitions (40 CFR 122.2)” above.

#### Public Notice Requirements (40 CFR 124.10(c))

The proposal to revise 40 CFR 124.10(c) to allow permitting authorities to provide public notice of NPDES major individual and general permits on the permitting authority’s publicly available website in lieu of the newspaper publication requirement would not result in an increase in effort or information collection. EPA is not proposing to alter the existing requirement related to newspaper publication, but is providing an optional provision that the permitting authority may choose at its discretion. However, to qualify for this provision, the permitting authority would be required to post the draft permit and fact sheet on the website during the public comment period and post the final permit and fact sheet for the entire term of the permit. The purpose of this proposed revision is to provide the permitting authority with an alternative method of providing notice of permit applications and hearings and provide flexibility to reach communities in a variety of methods. It is EPA’s understanding that the traditional approach to newspaper publication has become costly for permitting authorities to implement.

EPA's proposal intends to alleviate those costs by allowing the permitting authority to use its publicly available website in lieu of the traditional publication.

EPA estimates that public notice of draft permits in newspapers for NPDES major facilities, sewage sludge facilities and general permits currently costs approximately \$1.6 million per year, nationally.<sup>35</sup> This estimate excludes the costs of preparing the content of the NPDES public notice, and the costs of the other methods to provide notice besides newspaper publication, such as direct mailing. Any costs from EPA's proposed rule, however, are likely to be less than this amount. For example, EPA expects that the cost of posting a PDF copy of a public notice on a state's pre-existing NPDES website could be less than the cost of publishing such notices in a newspaper. Although EPA does not currently have estimates of those costs, this revision would be a significant decrease in burden for public notice requirements for permitting authorities. The rule would allow but not require state and federal permitting authorities to use electronic public notice instead of newspaper publication. Some states would continue to publish at least some notifications in newspapers.

This proposed revision would not result in an increase in effort or information collection. EPA specifically seeks comments on the potential cost savings for the public notice of NPDES major individual and general permits on a publicly available website in lieu of the newspaper publication requirement.

#### CWA section 401 Certification Process (40 CFR 124.55(a)(2))

The proposal to revise 40 CFR 124.55(a)(2) would broaden the circumstances under which federal NPDES permits could be modified after issuance to include conditions necessary to

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<sup>35</sup> EPA used \$1,000 (in 2010\$) as the publication cost for a public notice in a newspaper and assumed that there are 1,600 NPDES permit actions that require public notice via newspaper publication each year; thus, we arrive at the \$1.6 million per year estimate.

reflect more stringent section 401 certification provisions that result from state administrative or judicial decisions. EPA cannot predict how often this proposed provision would cause a permit to be modified. Any modifications resulting from requirements in state administrative or judicial decisions would follow EPA's existing permit modification regulations at 40 CFR 122.62. Any new permit requirements would be the result of an administrative or judicial decision and would not result directly from this proposed revision. Therefore, this proposed revision would not result in an increase in effort or information collection.

#### Fact Sheet Requirements (40 CFR 124.56)

The proposal to revise 40 CFR 124.56 to require specific documentation within the fact sheet content of the individual and general permit development would not result in an increase in effort or information collection. The proposed changes to the fact sheet content requirements do not establish any permit conditions or technical or administrative analyses that are not already required by the existing regulations. The revised regulations would require the permitting authority to document NPDES permit development work that the existing regulations already require. These proposed revisions would not impose any additional burdens for collecting new data or conducting new analyses, and may impose only a minimal burden for permit writers to document analyses that have already been conducted.

#### Deletion of 40 CFR 125.3(a)(1)(ii)

The proposed deletion of 40 CFR 125.3(a)(1)(ii) from the NPDES regulations would not result in an increase in effort or information collection. By deleting this outdated provision, EPA would clarify that this provision no longer applies to regulated entities.

## **V. Compliance Dates**

Following issuance of this rule, authorized states have up to one year to revise, as necessary, their NPDES regulations to adopt the requirements of this rule, or two years if statutory changes are needed, as provided at 40 CFR 123.62.

## **VI. Statutory and Executive Order Reviews**

### **A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises novel legal and policy issues. Accordingly, EPA submitted this action to the OMB for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action. Information regarding all statutes and executive orders discussed in this document can be found at <http://www.epa.gov/laws-regulations/laws-and-executive-orders>.

### **B. Paperwork Reduction Act (PRA)**

The changes being proposed to the applications and forms as well as all other information collection activities in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2529.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The ICR will describe the burden and costs associated with revisions made to regulations and forms related to preparing and reviewing applications for individual NPDES permits for point source and sewage sludge management permits. These revisions were necessary to clarify

NPDES definitions and application requirements, increase fact sheet and permit transparency, timeliness and environmental effectiveness, and modernize public notice methods.

The proposed revisions to 40 CFR 122.21 related to clarifications of NPDES definitions and application requirements would not result in an increase in level of effort or information collection. EPA is making revisions to several data fields on the forms to refine the content and to improve consistency with EPA's current data standards. The application forms is available in the docket for this rule. EPA estimates that the burden associated with these proposed changes would not change from the burden estimates contained in existing ICRs. This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB OMB Control No. 2040-0004, EPA ICR No. 0229.21.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

EPA requests comment on the impact of the specific changes set out in this proposal on NPDES application requirements, forms and other information collections. EPA also requests comment on whether and how a separate future action should address the utility and clarity of the information requests and on how to minimize the information collection burden on respondents, including the use of appropriate automated, electronic, mechanical, or other forms of information technology. Comments relating to this separate future action should be submitted to Docket ID No. EPA-HQ-OW-2016-0146 at <http://www.regulations.gov>.

### C. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This proposal would eliminate inconsistencies between regulations and application forms, improve permit documentation, transparency and oversight, provide clarifications to existing regulations and delete outdated provisions. We have therefore concluded that this action would have no net regulatory burden for directly regulated small entities.

EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts.

**D. Unfunded Mandates Reform Act (UMRA)**

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This proposal would eliminate inconsistencies between regulations and application forms, improve permit documentation, transparency and oversight, provide clarifications to existing regulations and delete outdated provisions. This proposed action will not impose significant burden on EPA, states or the regulated community, or specifically, any significant burden on any small entity. With respect to any impacts on authorized state programs, the costs involved in this action are imposed only by participation in a voluntary federal program. UMRA generally excludes from the definition of “federal intergovernmental mandate” duties that arise from participation in a voluntary federal program. Thus, this proposed rule is not subject to the



requirements of section 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, this proposed rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed rule does not have tribal implications, as specified in Executive Order 13175. EPA considered the potential impacts on tribes, and concluded that there would be no substantial direct compliance costs or impact on tribes. Because the purpose of the proposed rule is to eliminate inconsistencies between regulations and application forms, improve permit documentation, transparency and oversight, provide clarifications to existing regulations, and delete outdated provisions, it is not expected to have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Executive Order 13175 does not apply to this action and EPA determined that tribal consultation is not necessary for this action.

EPA specifically solicits input on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The proposed rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866 and because EPA does not believe that the

environmental health and safety risks addressed by this action present a disproportionate risk to children. This proposed rule would eliminate inconsistencies between regulations and application forms, improve permit documentation, transparency and oversight, provide clarifications to existing regulations, and delete outdated provisions.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rulemaking is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed rule would eliminate inconsistencies between regulations and application forms, improve permit documentation, transparency and oversight, provide clarifications to existing regulations, and delete outdated provisions.

I. National Technology Transfer and Advancement Act

This proposed rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

The EPA believes the human health or environmental risk addressed by this action will **not** have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This proposed rule would eliminate inconsistencies between regulations and application forms, improve permit documentation, transparency and oversight, provide clarifications to existing regulations and delete outdated provisions.

## **List of Subjects**

### 40 CFR Part 122

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

### 40 CFR Part 123

Administrative practice and procedure, Confidential business information, Hazardous substances, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

### 40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

### 40 CFR Part 125

Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: May 5, 2016.

Gina McCarthy,  
Administrator.

For the reasons set out in the preamble, the EPA proposes to amend Chapter I of Title 40 of the Code of Federal Regulations as follows:

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 et seq.

**Subpart A—Definitions and General Program Requirements**

2. Section 122.1 is amended by revising the note to § 122.1 to read as follows:

**§ 122.1 Purpose and scope.**

\* \* \* \* \*

[Note to § 122.1: Information concerning the NPDES program and its regulations can be obtained by contacting the Water Permits Division (4203), Office of Wastewater Management, U.S. EPA, 1200 Pennsylvania Avenue, NW, Washington, DC 20460 and by visiting the homepage at <http://www.epa.gov/npdes/>.]

3. Section 122.2 is amended by:

- a. Revising the definitions for “new discharger,” “proposed permit,” and “whole effluent toxicity” in paragraph (d); and
- b. Adding the definition, in alphabetical order, “pesticide applications to waters of the United States.”

The revisions and additions read as follows:

**§ 122.2 Definitions.**

New discharger means any building, structure, facility, or installation:

\* \* \* \* \*

(d) Which has never received a finally effective NPDES permit for discharges at that "site."

\* \* \* \* \*

Pesticide applications to waters of the United States means the application of biological pesticides, and the application of chemical pesticides that leave a residue, from point sources to waters of the United States. In the context of this definition of pesticide applications to waters of the U.S., this does not include agricultural stormwater discharges and return flows from irrigated agriculture, which are excluded by law (33 U.S.C. 1342(l)).

\* \* \* \* \*

Proposed permit means a State NPDES “permit” prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State, or a State NPDES permit designated as a proposed permit under § 123.44(k). A “proposed permit” is not a “draft permit.”

\* \* \* \* \*

Whole effluent toxicity (WET) means the aggregate toxic effect of an effluent measured directly by a toxicity test where the test results are based on acute (lethal) and/or chronic (lethal and sublethal) endpoints.

3. Section 122.3 is amended by revising paragraph (a) to read as follows:

**§ 122.3 Exclusions.**

\* \* \* \* \*

(a) Any discharge of sewage from vessels and any effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of:

- (1) A vessel of the Armed Forces within the meaning of section 312 of the CWA; and
- (2) A recreational vessel within the meaning of section 502(25) of the CWA. Until December 18, 2017, an NPDES permit is not required for a vessel that is less than 79 feet in length or a

fishing vessel as defined in 46 U.S.C. 2101 except for any discharge of ballast water or any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge either contributes to a violation of a water quality standard or poses an unacceptable risk to human health or the environment. None of these exclusions apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

\* \* \* \* \*

#### **Subpart B—Permit Application and Special NPDES Program Requirements**

4. Section 122.21 is amended by:

- a. Revising paragraph (a)(2)(i) introductory text;
- b. Revising paragraph (a)(2)(i)(A);
- c. Revising paragraph (c)(2)(ii)(B);
- d. Revising paragraphs (f) introductory text and (f)(2) through (4);
- e. Adding paragraphs (f)(9) and (10);
- f. Revising paragraphs (g) introductory text and (g)(1);
- g. Adding paragraph (g)(7)(ix);
- h. Revising paragraph (h)(1);
- i. Revising paragraph (i)(1)(iii);
- j. Revising paragraphs (j)(1)(i), (j)(1)(ii), and (j)(1)(viii)(D)(2) and (3);
- k. Adding paragraph (j)(1)(ix);

l. Revising paragraphs (j)(3)(i)(C), (j)(4)(i), (j)(5)(i), (j)(6)(i), (j)(6)(ii) introductory text, (j)(6)(ii)(B), (C), (E) and (G), (j)(8)(ii)(A)(3) and (j)(9);

m. Revising paragraphs (k) introductory text, (k)(1), and (k)(5)(vi);

n. Revising paragraphs (q)(1)(i), (q)(2)(i), (q)(8)(ii)(A), (q)(8)(vi) introductory text and (q)(8)(vi)(A), (q)(9)(iii)(B), (D), and (E), (q)(9)(iv)(A), (q)(10)(ii)(A), (q)(10)(iii)(B) and (q)(10)(iii)(K)(1), (q)(11)(ii)(A) and (q)(11)(iii)(B), (q)(12)(i), and (q)(13); and,

o. Revising paragraph (r)(3)(ii).

The additions and revisions read as follows:

**§ 122.21 Application for a permit (applicable to State programs, see § 123.25).**

(a) \* \* \*

(2) \* \* \*

(i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting: U.S. EPA, Mail Code 4203M, 1200 Pennsylvania Ave., NW, Washington, DC 20460 or by visiting <http://www.epa.gov/npdes>. Applications for EPA-issued permits must be submitted as follows:

(A) All applicants, other than POTWs, TWTDS, vessels, and pesticide applicators must submit Form 1.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(B) The applicant's name, address, telephone number, electronic mail address and ownership status;

\* \* \* \* \*

(f) Information requirements. All applicants for NPDES permits, other than POTWs, other TWTDS, vessels, and pesticide applicators, must provide the information in paragraphs (f)(1) through (10) of this section to the Director, using the application form provided by the Director. Additional information required of applicants is set forth in paragraphs (g) through (k) and (q) through (r) of this section.

\* \* \* \* \*

(2) Name, mailing address, and location, including latitude and longitude to the nearest second and method of collection, of the facility for which the application is submitted.

(3) Up to four SIC and NAICS codes that best reflect the principal products or services provided by the facility.

(4) The operator's name, address, telephone number, electronic mail address, ownership status, and status as Federal, State, private, public, or other entity.

\* \* \* \* \*

(9) An indication of whether the facility uses cooling water and the source of the cooling water. (Facilities that use a cooling water intake structure as described at 40 CFR 125.91 must comply with requirements at 40 CFR 122.21(r)).

(10) An indication of whether the facility is requesting any of the variances at 40 CFR 122.21(m).

(g) Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers. Existing manufacturing, commercial, mining, and silvicultural dischargers applying



for NPDES permits, except for those facilities subject to the requirements of § 122.21(h), shall provide the following information to the Director, using application forms provided by the Director.

(1) Outfall location. The latitude and longitude to the nearest second, including method of collection, and the name of the receiving water.

\* \* \* \* \*

(7) \* \* \*

(ix) Existing data may be used, if available, in lieu of sampling done solely for the purpose of this application. All existing data for pollutants specified in paragraphs (g)(7)(i) through (viii) of this section that is collected within four and one-half years of the application must be included in the pollutant data summary submitted by the applicant. If, however, the applicant samples for a specific pollutant on a monthly or more frequent basis, it is only necessary, for such pollutant, to summarize all data collected within one year of the application.

\* \* \* \* \*

(h) \* \* \*

(1) Outfall location. Outfall number, latitude and longitude to the nearest second, including the method of collection, and the name of the receiving water.

\* \* \* \* \*

(i) \* \* \*

(1) \* \* \*

(iii) Latitude and longitude of the production area (entrance to production area) to the nearest second, including method of collection;

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(i) Facility information. Name, mailing address, and location of the facility, including the latitude and longitude to the nearest second and method of collection, for which the application is submitted;

(ii) Applicant information. Name, mailing address, telephone number, and electronic mail address of the applicant, and indication as to whether the applicant is the facility's owner, operator, or both;

\* \* \* \* \*

(viii) \* \* \*

(D) \* \* \*

(2) The name, mailing address, contact person, phone number, and electronic mail address of the organization transporting the discharge, if the transport is provided by a party other than the applicant;

(3) The name, mailing address, contact person, phone number, electronic mail address and NPDES permit number (if any) of the receiving facility; and

\* \* \* \* \*

(ix) An indication of whether applicant is operating under or requesting to operate under a variance as specified at 40 CFR 122.21(n).

\* \* \* \* \*

(3) \* \* \*

(i) \* \* \*

(C) Latitude and longitude, to the nearest second, including the method of collection;

\* \* \* \* \*

(4) \*\*\*. (i) As provided in paragraphs (j)(4)(ii) through (x) of this section, all applicants must submit to the Director effluent monitoring information for samples taken from each outfall through which effluent is discharged to waters of the United States, except for CSOs. The Director may allow applicants to submit sampling data for only one outfall on a case-by-case basis, where the applicant has two or more outfalls with substantially identical effluent. The Director may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone. For POTWs applying prior to commencement of discharge, data shall be submitted no later than 18 months after the commencement of discharge;

\* \* \* \* \*

(5) \*\*\*. (i) All applicants must provide an identification of any whole effluent toxicity tests conducted during the four and one-half years prior to the date of the application on any of the applicant's discharges or on any receiving water near the discharge. For POTWs applying prior to commencement of discharge, data shall be submitted no later than 18 months after the commencement of discharge.

\* \* \* \* \*

(6) \* \* \*

(i) Number of significant industrial users (SIUs) and non-significant categorical industrial users (NSCIUs), as defined at 40 CFR 403.3(v), including trucked or hauled waste, discharging to the POTW; and

(ii) POTWs with one or more SIUs or NSCIUs shall provide the following information for each SIU and NSCIU that discharges to the POTW:

\* \* \* \* \*

(B) Description of all industrial processes that affect or contribute to the SIU's or NSCIU's discharge;

(C) Principal products and raw materials of the SIU that affect or contribute to the SIU's or NSCIU's discharge;

\* \* \* \* \*

(E) Whether the SIU or NSCIU is subject to local limits;

\* \* \* \* \*

(G) Whether any problems at the POTW (e.g., upsets, pass through, interference) have been attributed to the SIU or NSCIU in the past four and one-half years.

\* \* \* \* \*

(8) \* \* \*

(ii) \* \* \*

(A) \* \* \*

(3) Latitude and longitude, to the nearest second, including the method of collection; and

\* \* \* \* \*

(9) Contractors. All applicants must provide the name, mailing address, telephone number, electronic mail address and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility; and

\* \* \* \* \*

(k) Application requirements for new sources and new discharges. New manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits (except for new discharges of facilities subject to the requirements of paragraph (h) of this section or new discharges of storm water associated with industrial activity which are subject to the

requirements of § 122.26(c)(1) and this section (except as provided by § 122.26(c)(1)(ii)) shall provide the following information to the Director, using the application forms provided by the Director:

(1) Expected outfall location. The latitude and longitude to the nearest second, including the method of collection, and the name of the receiving water.

\* \* \* \* \*

(5) \* \* \*

(vi) No later than 18 months after the commencement of discharge from the proposed facility, the applicant is required to complete and submit items V and VI of NPDES application Form 2C (see § 122.21(g)). However, the applicant need not complete those portions of Item V requiring tests which have already been performed and reported under the discharge monitoring requirements of the NPDES permit.

\* \* \* \* \*

(q) \* \* \*

(1) \* \* \*

(i) The name, mailing address, and location, including latitude and longitude to the nearest second and method of collection, of the TWTDS for which the application is submitted;

\* \* \* \* \*

(2) \* \* \*

(i) The name, mailing address, telephone number, and electronic mail address,

\* \* \* \* \*

(8) \* \* \*

(ii) \* \* \*

(A) The name, mailing address, and location, including the latitude and longitude to the nearest second and the method of collection, of the other facility;

\* \* \* \* \*

(vi) If sewage sludge from the applicant's facility is provided to another “person who prepares,” as defined at 40 CFR 503.9(r), and the sewage sludge is not subject to paragraph (q)(8)(iv) of this section, the applicant must provide the following information for each facility receiving the sewage sludge:

(A) The name, mailing address, and electronic mail address of the receiving facility;

\* \* \* \* \*

(9) \* \* \*

(iii) \* \* \*

(B) The site's latitude and longitude to the nearest second and method of collection;

\* \* \* \* \*

(D) The name, mailing address, telephone number, and electronic mail address of the site owner, if different from the applicant;

(E) The name, mailing address, telephone number, and electronic mail address of the person who applies sewage sludge to the site, if different from the applicant;

\* \* \* \* \*

(iv) \* \* \*

(A) Whether the applicant has contacted the permitting authority in the State where the bulk sewage sludge subject to §503.13(b)(2) will be applied, to ascertain whether bulk sewage sludge subject to §503.13(b)(2) has been applied to the site on or since July 20, 1993, and if so, the

name of the permitting authority and the name, phone number, and electronic mail address if available, of a contact person at the permitting authority;

\* \* \* \* \*

(10) \* \* \*

(ii) \* \* \*

(A) The site name or number, contact person, mailing address, telephone number, and electronic mail address for the surface disposal site; and

\* \* \* \* \*

(iii) \* \* \*

(B) The unit's latitude and longitude to the nearest second and method of collection;

\* \* \* \* \*

(K) \* \* \*

(1) The name, contact person, mailing address, and electronic mail address of the facility; and

\* \* \* \* \*

(11) \* \* \*

(ii) \* \* \*

(A) The name and/or number, contact person, mailing address, telephone number, and electronic mail address of the sewage sludge incinerator; and

\* \* \* \* \*

(iii) \* \* \*

(B) The incinerator's latitude and longitude to the nearest second and method of collection;

\* \* \* \* \*

(12) \* \* \*

(i) The name, contact person, mailing address, electronic mail address, location (including latitude and longitude to the nearest second and the method of collection), and all applicable permit numbers of the MSWLF;

\* \* \* \* \*

(13) Contractors. All applicants must provide the name, mailing address, telephone number, electronic mail address and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility related to sewage sludge generation, treatment, use, or disposal;

\* \* \* \* \*

(r) \* \* \*

(3) \* \* \*

(ii) Latitude and longitude to the nearest second and the method of collection for each cooling water intake structure;

\* \* \* \* \*

### **Subpart C—Permit Conditions**

4. Section 122.44 is amended by:

- a. Revising paragraphs (d)(1) introductory text and (d)(1)(ii);
- b. Adding paragraph (d)(1)(vii)(C);
- c. Revising the note to paragraph (k)(4);
- d. Revising paragraph (l)(2); and,
- e. Adding paragraph (l)(3).

The additions and revisions read as follows:

**§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).**



\* \* \* \* \*

(d) \* \* \*

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality, and ensure consistency with the State antidegradation policy established under § 131.12.

\* \* \* \* \*

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), the use of relevant qualitative or quantitative data, analyses, or other information on pollutants or pollutant parameters to assess the need for a water quality-based effluent limitation, and where appropriate, the dilution of the effluent in the receiving water. A dilution allowance under this paragraph must comply with applicable dilution and mixing zone requirements and low flows established in State water quality standards and must be supported by data or analyses that account for the presence of each assessed pollutant or pollutant parameter in the receiving water (see fact sheet requirements at § 124.56(a)).

\* \* \* \* \*

(vii) \* \* \*

(C) Any dilution allowance complies with applicable dilution and mixing zone requirements and low flows established in State water quality standards and must be supported by data or analyses

quantifying or accounting for the presence of each limited pollutant or pollutant parameter in the receiving water (see fact sheet requirements at § 124.56(a)).

\* \* \* \* \*

(k)\*\*\*

(4)\*\*\*

**Note to Paragraph (k)(4):** Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. EPA guidance documents can be obtained through the National Service Center for Environmental Publications (NSCEP) at <http://www.epa.gov/nscep>. In addition, States may have BMP guidance documents.

\* \* \* \* \*

(l) \* \* \*

(2)(i) In the case of effluent limitations established on the basis of section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(ii) In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303(d) or (e) of the CWA, a permit may not be renewed, reissued, or modified to contain effluent limitations that are less stringent than the comparable effluent limitations in the previous permit except in compliance with paragraph (1)(3) of this section.

(iii) Exceptions. A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if:

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(iv) Limitations. In no event may a permit with respect to which paragraph (1)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

**Note to paragraph (1)(2).** Paragraph (2)(iii)(B)(1) of this section shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3)(i) Standard Not Attained. For waters identified under section 303(1)(A) of the Act where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be

revised only if : (A) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (B) the designated use which is not being attained is removed in accordance with regulations established under this section.

(ii) Standard Attained. Any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation requirements established under this section.

5. Section 122.45 is amended by revising the section heading and paragraph (b)(1) to read as follows:

**§ 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see 40 CFR 123.25)**

\* \* \* \* \*

(b) Production-based limitations. (1) In the case of POTWs, permit effluent limitations, standards, or prohibitions derived from technology-based requirements pursuant to § 125.3(a)(1) shall be calculated based on design flow.

\* \* \* \* \*

**PART 123—STATE PROGRAM REQUIREMENTS**

6. The authority citation for part 123 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1252 et seq.

**Subpart C—Transfer of Information and Permit Review**

7. Section 123.44 is amended by adding paragraph (k) to read as follows:

**§ 123.44 EPA review of and objections to State permits.**

\* \* \* \* \*

**Option 1 for Paragraph (k)(1)**

(k)(1) Where a State does not submit a proposed permit (or draft permit, if applicable under paragraph (j) of this section) to EPA within two years, after the expiration of the existing permit, and the permit is administratively continued under state law in accordance with § 122.6(d), EPA may, in its discretion, review the administratively continued permit as a proposed permit, in accordance with the procedures in paragraphs (a)(1) through (h)(3) of this section.

**Option 2 for Paragraph (k)(1)**

(k)(1) Where a State does not submit a proposed permit (or draft permit, if applicable under paragraph (j) of this section) to EPA within five years, after the expiration of the existing permit, and the permit is administratively continued under state law in accordance with § 122.6(d), EPA may, in its discretion, review the administratively continued permit as a proposed permit, in accordance with the procedures in paragraphs (a)(1) through (h)(3) of this section.

**Option 1 for Paragraph (k)(2)**

(2) To review an expired and administratively continued permit under this paragraph, EPA must provide the State and the permittee with written notice stating that if a proposed permit (or draft permit, if applicable under paragraph (j) of this section) is not provided within 180 days, the Regional Administrator will designate the expired permit as a proposed permit submitted to EPA for review under this section. EPA may submit this notice any time beginning two years after permit expiration.

**Option 2 for Paragraph (k)(2)**

(2) To review an expired and administratively continued permit under this paragraph, EPA must provide the State and the permittee with written notice stating that if a proposed permit (or draft permit, if applicable under paragraph (j) of this section) is not provided within 180 days, the

Regional Administrator will designate the expired permit as a proposed permit submitted to EPA for review under this section. EPA may submit this notice any time beginning five years after permit expiration.

(3) If the State submits a draft or proposed permit for EPA review at any time before exclusive authority to issue the permit passes to EPA under paragraph (h) of this section, EPA will suspend its designation of the administratively continued permit as a proposed permit under this paragraph and will evaluate the proposed permit (or draft permit, if applicable under paragraph (j) of this section) submitted by the State in accordance with the procedures described in paragraphs (a)(1) through (h)(3) of this section.

(i) If the State does not reissue the permit within 180 days following completion of EPA's review of the draft or proposed permit submitted by the State in accordance with paragraph (k)(3) of this section, EPA may reinstate its designation of the administratively continued permit as the proposed permit, and the procedures and timelines established in paragraphs (a)(1) through (h)(3) of this section will proceed from the point of the suspension. EPA must provide the State and permittee written notice of this decision to reinstate the designation.

(ii) [Reserved]

## **PART 124—PROCEDURES FOR DECISIONMAKING**

8. The authority citation for part 124 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1253 et seq.

### **Subpart A - General Program Requirements**

9. Section 124.10 is amended by revising (c) introductory text and adding paragraph (c)(2)(iv) to read as follows:

**§ 124.10 Public notice of permit actions and public comment period.**

\* \* \* \* \*

(c) Methods (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA)). Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

\* \* \* \* \*

(2) \* \* \*

(iv) For NPDES major permits and NPDES general permits, in lieu of the requirement to post a notice in a daily or weekly newspaper, as described in paragraph (2)(i) of this section, the Director may post all notices required by this paragraph to the permitting authority's public website. If the Director selects this option, in addition to meeting the requirements in § 124.10(d), the Director must post the draft permit and fact sheet on the website during the public comment period, and must post the final permit, fact sheet and response to comments (if any) on the website from the date of issuance of the permit until the permit is reissued or terminated.

**Note to paragraph (c)(2)(iv):** The Director is encouraged to ensure that the method(s) of public notice effectively informs all interested communities and allows access to the permitting process for those seeking to participate.

#### **Subpart D—Specific Procedures Applicable to NPDES Permits**

10. Section 124.55 is amended by revising paragraph (b) to read as follows:

#### **§ 124.55 Effect of State certification.**

\* \* \* \* \*

(b) If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under § 124.53 may issue a modified



certification or notice of waiver and forward it to EPA. If the modified certification or notice of waiver is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the modified certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit to be consistent with any more stringent conditions added to the certification following resolution of an administrative or judicial challenge to the certification. In all other instances where the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

\* \* \* \* \*

11. Section 124.56 is amended by:

- a. Revising paragraphs (a), (b)(1)(vi), and (c); and
- b. Adding paragraph (b)(1)(vii).

The additions and revision read as follows:

**§ 124.56 Fact sheets.**

\* \* \* \* \*

(a) Any calculations or other necessary explanation of the derivation of all effluent limitations, standards and other permit conditions specific to the permitted discharge, including sewage sludge use or disposal conditions. Where effluent limitations and conditions are carried forward from a previous permit, explanation of the basis of the existing limitations and conditions must be included in the fact sheet or administrative record for the draft permit. Where the information

in paragraphs (a)(1) and (2) of this section is contained in other documents that are part of the administrative record, the fact sheet may provide a brief summary of the required information and a specific reference to the source document within the administrative record, rather than repeating the information. Where applicable, fact sheets must contain:

(1) For NPDES individual permits:

(i) A citation to the specific federal or state effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by § 122.44 from which effluent limitations and conditions are derived;

(ii) An identification of:

(A) The receiving water(s);

(B) The State water quality standards that apply to the receiving water(s);

(C) The CWA section 303(d)/305(b) assessment status of the receiving water(s), and;

(D) Whether a total maximum daily load has been established for any pollutant or pollutant parameter for which the receiving water(s) is listed as impaired;

(iii) An explanation and calculations for effluent limits or conditions necessary to achieve technology-based standards required by § 122.44(a) and best management practices required pursuant to § 122.44(k);

(iv) An explanation of the basis for the inclusion of requirements in addition to, or more stringent than, promulgated effluent limitations guidelines or standards consistent with § 122.44(d), including, but not limited to, a description of:

(A) How pollutants and pollutant parameters were selected for analysis for the need for effluent limitations under § 122.44(d) to achieve water quality standards, including a summary of effluent characteristics;

(B) The receiving water ambient pollutant concentration data for all pollutants for which a dilution or mixing allowance is granted pursuant to § 122.44(d)(1)(ii), or an explanation of why such data are not applicable or available;

(C) For any proposed water quality-based effluent limitation or condition required by § 122.44(d), any dilution or mixing allowance, including a discussion of how ambient pollutant concentrations were considered in the water quality analysis;

(D) If an EPA-approved or established total maximum daily load has assigned a waste load allocation to the proposed discharge, how permit effluent limitations and conditions were developed consistent with the assumptions of the waste load allocation, and;

where the permitting authority determines that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion above any State narrative water quality criterion, how the permit ensures compliance with applicable State narrative water quality criteria consistent with § 122.44(d)(1)(v) and (vi);

(v) For any proposed effluent limitation or condition required by § 122.44, information sufficient to ensure that the discharge is consistent with the State's antidegradation requirements; and

(vi) a discussion of the permit's monitoring and reporting requirements, including an assurance that the prescribed analytical methods meet the requirements of § 122.44(i).

(2) For NPDES general permits:

(i) A description of how the issuance of the general permit conforms with the requirements of § 122.28, including the geographic area of coverage, the types, classes, or categories of waters to which the general permit authorizes discharge, and the sources that will be covered by the general permit;

- (ii) A citation to the specific federal or State effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by § 122.44 from which effluent limitations and conditions are derived;
- (iii) A description and rationale for other requirements included in the general permit, including effluent limits or conditions necessary to achieve technology-based standards required by § 122.44(a) and best management practices required pursuant to § 122.44(k);
- (iv) A description of how the general permit ensures that discharges are controlled as necessary to meet applicable State water quality standards, including consideration of State antidegradation policies and applicable waste load allocations from EPA approved or established total maximum daily loads, in accordance with the requirements of § 122.44(d);
- (v) A discussion of proposed monitoring and reporting conditions, including assurance that prescribed analytical methods meet the requirements of § 122.44(i); and
- (vi) A description of the Notice of Intent information and submission requirements, and the process by which the permit provides authorization to discharge or authorization to engage in sludge use and disposal practices. Where the general permit does not require a Notice of Intent, a description of why the Notice of Intent process is inappropriate in accordance with the criteria established in § 122.28(b)(2)(v).

(b)(1) \* \* \*

- (vi) Waivers from monitoring requirements granted under § 122.44(a) of this chapter; or
- (vii) Compliance schedules granted under § 122.47 of this chapter.

\* \* \* \* \*

- (c) When appropriate, a sketch or detailed description of the location of each discharge or regulated activity, including the geographic coordinates, described in the application; and

\* \* \* \* \*

**PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

12. Revise the authority citation for part 125 to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C., 1251 et seq.

**Subpart A—Criteria and Standards for Imposing Technology-Based Treatment Requirements Under Sections 301(b) and 402 of the Act**

**§125.3 [Amended]**

13. Section 125.3 is amended by removing and reserving paragraph (a)(1)(ii).

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